Supreme Court, U.S.
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No. 740

IN THE

SUPREME COURT

OF THE

United States

October Term, 1952

MONTE G. CLY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT THEREOF. MOTION FOR LEAVE TO PROCEED UPON THE TYPEWRITTEN RECORD.

MORRIS LAVINE
Attorney at Law
620 Bartlett Building
Los Angeles 14, California
Attorney for Petitioner.

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BRIEF IN SUPPORT THEREOF. MOTION FOR LEAVE TO PROCEED UPON THE TYPEWRITTEN RECORD.

To the Honorable Chief Justice Fred M. Vinson and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Monte Cly, respectfully petitions for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse the judgments of that court, and in respect thereto sets forth as follows:

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254(1) and the Rules on Appeal in criminal cases established by this Honorable Court.

The judgment of the Court of Appeals was rendered on January 29, 1953. A petition for rehearing was duly and regularly filed in that court and rehearing was denied on March 3, 1953. The Petition for Certiorari is filed within thirty days of the denial of the rehearing, and an extension of an additional thirty days granted by Justice Wm. O. Douglas, March 28, 1953.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is cited in 201 Fed. (2) 806. It is to be found on page 47 of Volume 1 of Proceedings had in the United States Court of Appeals.

STATUTES INVOLVED

(OLD) TITLE 18 U.S.C. §207 READS AS FOLLOWS:

"§207. (*Criminal Code, section 117.*) *Official accepting bribe.* Whoever, being an *officer* of the United States, or a person acting for or on behalf of the United States, *in any official capacity,* under or by virtue of the authority of any department or *office of the Government thereof*"; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any *question, matter, cause, or proceeding which may at any time be pending,* or which may by law be brought *before him in his official capacity,* or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States. (R. S. §§ 5501, 5502; Mar. 4, 1909, c. 321, §117, 35 Stat. 1109.)" (Italics ours as to part of statute under which indictment was brought.)

(NEW) TITLE 18, U.S.C. §202 READS AS FOLLOWS:

"§202. *Acceptance or solicitation by officer or other person.*

Whoever, being an *officer* or employee of, or person acting for or on behalf of the United States, *in an official capacity,* under or by virtue of the *authority of any department or agency*[a] *thereof,* or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any *check*[b], order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, *with intent to have his decision or action on any question,* matter, cause, *or proceeding which may at any time be pending,* or which may by law be brought *before him in his official capacity,* or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States." Adopted by Congress in 1948.

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[a]The words "office of the government" was changed to read "agency" as noted in the old and new sections above.

[b]Note the word "check" was added in this section.

HOUSING AND RENT ACT OF 1948, CH. 161, 62 STAT. 93 AT PAGE 95:

"(c) The Housing Expediter is hereby authorized and directed to remove any or all maximum rents before this title [this appendix] ceases to be in effect, in any defense-rental-area or portion thereof or with respect to any class of housing accommodations in any such area or portion thereof, if in his judgment the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exist, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met. *The Housing Expediter is further authorized and directed to remove maximum rents from any or all luxury housing accommodations in any defense-rental area or portion thereof, if in his judgment such action would result in the creation of additional rental units by conversion.* The Housing Expediter shall from time to time make surveys with a view to carrying out the purpose of this subsection to decontrol housing accommodations at the earliest practicable time.

"(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c).[1]

[1]This subsection (d) appears in the Housing and Rent Act of 1947, and it was not amended in the Housing and Rent Act of 1948.

"(e) (1) The Housing Expediter is authorized and directed to create *and, if necessary continue in existence until the termination of this Act* in each defense-rental area *whether or not under Federal rent control* or such portion thereof as he may designate, a local advisory board, *The Housing Expediter shall whenever in his judgment there is need therefor, create a local advisory board in any part of an area designated under the provisions of the Emergency Price Control Act of 1942, as amended* [*50:Appx. 25*], *prior to March 1, 1947, as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of such Act, in which maximum rents were not being regulated under such Act on March 1, 1947,* each such board shall consist of not less than five members who are citizens of the area and who, insofar as practicable, as a group are representative of the affected interests in the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors: *Provided,* That in any case where the Governor has made no recommendations for original appointments to local boards or appointments to fill vacancies, within thirty days after request therefor (subsequent to the date of enactment of the Housing and Rent Act of 1948 [Mar. 30, 1948] from the Housing Expediter, the Housing Expediter shall without such recommendations appoint the original members of such boards or such members as may be required to fill vacancies. Nothing in the foregoing provisions shall require the reappointment of present members of local advisory boards,

but any change in the membership of any local advisory board necessitated by this provision shall be effectuated as promptly as may be practicable. Each such board shall have sufficient members to enable it promptly to consider individual adjustment cases coming before it on which *the board* shall make recommendations to the officials administering this title [this appendix] within its area; and before recommending any such adjustment *the board* shall give notice to the parties and shall hold a hearing at the request of either party. *Upon petition by a representative group of tenants or landlords, the board, if it finds that the petition is substantial in character, shall hold a public hearing in accordance with the requirements set forth in paragraph (4) of this subsection on any of the matters set forth in subparagraphs (A) and (B) of this paragraph. Such hearing shall be begun within thirty days after the filing of such petition, and shall be completed within thirty days after it is begun. Should the board for any reason fail to hold such hearing, the Housing Expediter, upon notice of that fact given by such group, shall (unless he finds that the petition is not substantial in character) hold a public hearing in like manner on such matters. Such hearing shall be begun within thirty days after the giving of such notice by such group, and shall be completed within thirty days after it is begun. If the Housing Expediter finds that such petition is not substantial in character, such group may file a complaint with the Emergency Court of Appeals within thirty days after the date such finding is made. Thereupon,*

if it finds that the Housing Expediter's finding is not in accordance with law, the Emergency Court of Appeals shall have jurisdiction to enter, within thirty days after the date of filing of such complaint, an order directing the Housing Expediter to hold such hearing. If a hearing is held by either the board or the Housing Expediter, a recommendation by the board or decision by the Housing Expediter, as the case may be, on the merits of the matter shall be rendered within thirty days from the date of completion of such hearing, and the local board forthwith shall forward its recommendation to the Housing Expediter. Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

"(A) Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction, or with respect to any class of housing accommodations within such area or any portion thereof, if in the judgment of the local board the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exists, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met; and

"(B) Adjustments, other than individual adjustments, in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be

necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title [this appendix]; and

"(C) Operations generally of the local rent office with particular reference to hardship cases.

"(2) The Housing Expediter shall furnish the local boards *suitable office space and stenographic assistance* and *reporting services for public hearings (including attendance fees) and* shall make available to such boards any records and other information in the possession of the Housing Expediter with respect to the establishment and maintenance of maximum rents and housing accommodations in the respective defense-rental areas which may be requested by such boards."

SECTION 204 (e) (3) OF THE HOUSING AND RENT ACT OF 1948 PROVIDES AS FOLLOWS:

"Upon receipt of any recommendation from a local board, the Housing Expediter shall promptly notify the local board, in writing, of the date of his receipt of such recommendation. Except as provided hereinafter in this subsection, within thirty days after receipt of any recommendation of a local board such recommendation shall be approved or disapproved or the local board shall be notified in writing of the reasons why final action cannot be taken in thirty days. Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendation into effect."

TITLE 5, SECTION 16, U. S. CODES READS AS FOLLOWS:

"§16. Oath of Office. The oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military or naval service, except the President of the United States shall be as follows: 'I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.' This section shall not affect the oaths prescribed by existing statutes in relation to the performance of duties in special or particular subordinate offices and employments. The provisions of this section shall in no manner affect any right, duty, claim, obligation, or penalty existing or incurred on or before May 13, 1884; and all and every such right, duty, claim, obligation, and penalty shall be heard, tried and determined, and effect shall be given thereto, in the same manner as if this section had not been passed. (R. S. §§1756, 1757; May 13, 1884, c. 44, §§2, 3, 23 Stat. 22.)"

TITLE 5, SECTION 18, U. S. CODES READS AS FOLLOWS:

"§18. Same; who may administer. The oath of office required by section 16 of this title may

be taken before any officer who is authorized either by the laws of the United States or by the local municipal law, to administer oaths, in the State, Territory, or District where such oath may be administered. (R. S. §1758.)"

SHORT STATEMENT OF FACTS

The Petitioner, Monte Cly is a real estate broker and general contractor living in the Bay Area of Southern California, making up those small cities known as Venice, Ocean Park, Santa Monica, and the country back of it. He had been residing in that area around twenty years (T. R. 373). As a real estate broker he was familiar with the rental situation in and about this bay area since 1942. He had been active in the community; had his own stenographic force and his own offices, at 32 Avenue 17, Venice, California. The Government never furnished him or Local Board 8 with any office space or stenographic service; hence he used his own.

Under the Housing and Rent Act of 1947, Laws of Congress, 1st Session, effective July 1st, 1947, 20413 and 20414, there was a provision for the appointment by the Housing Expediter upon recommendation of the Governor of the State of five members of local advisory boards. Mr. Cly was solicited to become a member of Local Board No. 8 by the county supervisor of the district and asked to devote his time to the matter. (R. 374.) He agreed to take the position, but no oath of office was ever *administered* to him, as required

by Title 5, Section 16, U. S. Codes and Title 5, Section 18, U. S. Codes. Instead, he was given a document called an "Oath of Office" which he signed on the 6th day of November, 1947 (R. Tr. 240-241), before F. C. Moeller, Los Angeles Rent Supervisory Board Liaison Officer. This officer was not one designated by Title 5, Section 18, to administer oaths and there was no oath actually given. It was stipulated that there appears on Government Exhibit 14 a record of an oath of office signed by Monte Cly on the 6th day of November, 1947, the date the oath of office was signed by him. (R. Tr. 239.) This was prior to the new housing act.

The local boards and their members were not "officers" or departments of the United States.

The position was purely honorary. There was no provision for any pay by the Government, nor was there any provision to pay for the costs of any inspections or any trips in the area. While the statute provided for the furnishing of office space and a stenographer for the board, none was provided. No rules or regulations covering the rights and duties of the board were published in the federal register. There were no formal rules or dates for any meetings of this Advisory Board, although it met twice a month or whenever the secretary called them. On March 30th, 1948, Public Law 129, Housing and Rent Act of 1947 passed by the 80th Congress was amended to read as we have set it out in our Appendix to this Brief. Mr. Cly had acted on the request under the old law and continued under

the new law. Nothing in the law forbad being compensated privately for time, stenographic services, paper.

Mr. Lindsay T. Hill became "Chairman of the Board" in January 1948. The newspapers carried stories of the formation of the board as the result of which hundreds of people started to come to the offices of the petitioner, and kept his offices occupied and busy day and night. About sixty percent were landlords and forty percent were tenants. (R. Tr. 250.) The Board as a board itself met in downtown Los Angeles when it met. (R. Tr. 251.)

There was no provision for pay by the government. When the large number of people kept crowding into Mr. Cly's private offices and using all his time and telephones and stationery and other facilities, Mr. Hill, a Government witness and the Chairman of the Board, testified that he asked the local rent director in charge of housing in Southern California, Mr. Ben Koepke, if charges could be made for services rendered in filling in the forms and other papers. The case against Mr. Hill (who, similarly to petitioner, took private fees) was dismissed. He testified that he asked Mr. Koepke if charges could be made for rendering these services in filling forms and other papers, and he commenced to that (make charges) when he got the green light from the boss, (Mr. Koepke). (R. Tr. 255.)

Mr. Hill testified: "Many persons would come in with, say, one apartment and say they lived in half of a double house. No charge was made for that."

Several hundred were made out without charges—at least 90% (R. Tr. 256). The charges that were made were for preliminary observation, for the work that was done in preparing the papers, going out and examining the properties, etc. (R. 69.) There was no statute or regulation published in the Federal Register covering the duty of members of the Board, or requiring them to spend their time, their money or their gasoline to examine the properties or to let landlords and tenants occupy and use their private offices and their home. This was done voluntarily by petitioner and on his own time. (R. 269.) No statute or regulattion forbad them from being compensated privately for their stenographic or personal help to tenants or landlord, their gasoline and use of their car, their telephonic or office facilities or their time.

The evidence was that the Advisory Board had no powers and the housing expediter followed no recommendations, except what his own inspectors gave. If the Advisory Board recommended any increase, the Housing Expediter sent his own inspectors out and if they didn't like the looks of the property and they thought the Board was out of line, they refused the increase. (R. 271.)

There was an arrangement between Mr. Hill and Mr. Cly to assist all tenants and landlords in filling out their papers. (R. 251.) After Mr. Koepke gave Mr. Hill the green light, they began making a charge for their services, shortly after the work load became very heavy. (R. 251.) Before making the charges,

Mr. Hill discussed it with Mr. Cly first and then he discussed it with Mr. Koepke, the local rent area director, for the Housing Expediter. That was in June, 1948 (R. 252.) When he talked to Mr. Koepke, Mr. Cly was there and he asked Mr. Koepke, "Is it perfectly all right to charge for time and service?" and Mr. Koepke said, "Yes". (R. 253-254.)

The case against Mr. Hill was dismissed. (R. 244.) Mr. Hill and Mr. Cly divided whatever monies were received in half for the personal services rendered. R. 201.) No rule or regulation forbade taking these sums. There was no government salary. The services rendered for the government, including the use of Mr. Cly's offices, his stationery, his stenographer, etc., were without charge to the government.

Mr. Hill, who was a government witness, and thereby vouched for by the government, testifed as follows:

> "Mr. Koepke, the Housing Expediter, or any one there, did he authorize you to make charges for your services to landlords or tenants?
>
> A. At one time we asked Mr. Koepe. Mr. Cly and myself asked—said that we had a lot of people wanting to file papers, etc—and what should we do, and Mr. Koepke said, 'Why charge them for it, of course, for your time and trouble in coming down here.'
>
> Q. Did he say how much to charge?
>
> A. No." (R. 216.)

Newspapers carried wide publicity regarding the Board's activities about January 12th, 1947, and peo-

ple started coming to petitioner's house, and to his office, using his phones, morning, noon and night. (R. 376.) They came in a constant stream; even at night a lot of them would come to his house. It required all his time and effort to prepare and help them with papers and documents.

The five-man advisory rent board never held any meetings according to any set schedules, (R. 327), but Miss June Luscher would notify the Board Members when an accumulated amount of business would justify a meeting. This would result from the landlords and tenants applying for hearings to the Advisory Board of their applications or complaints or anything that they wished brought to the attention of the Board. There was a regular formal application they filled out and when a few of those would gather together, then she would notify the members to come in and go into it. (R. 329.) The meetings of the Board required a quorum of three. The Board members would often bring in cases which apparently had been brought to their personal attention by individuals. They would bring them into the meetings themselves. (R. 329.) Usually Mr. Hill and Mr. Cly attended the meeting. If there were only three present, it took a unanimous vote to make an advisory recommendation. (R. 330.) These meetings would be held on Santee Street in Los Angeles. (R. 332.)

Miss Luscher handled the paper work for the Board and any actual final orders that would be issued would be routed to the proper department for their examina-

tions—the proper department to where recommendations would go. If the Board had recommended an increase in rent, it would go to the examining department where the actual orders and consideration were issued, and be considered and finally signed only by the Rent Director, Mr. Koepke. (R. 331.) Before such action there would be an inspection which would be requested and the inspector would inspect the property.

Herbert A. Frank testified that he was a consultant in O.P.A. matters in the Bay Area of Santa Monica. He had been a rent inspector for the O.P.A. and when they closed their offices, he went into business for himself as a rent consultant. He prepared petitions for landlords and things like that and charged a fee. (R. 116.)

Mr. Hill, the Chairman of the Board, prepared and assisted in preparing papers and received half of the sums of money which Mr. Cly received, and the case against him was dismissed, and he was a government witness, and his testimony was thus vouched for by the government.

Mr. Koepke denied he gave authority to make charges. (R. 244.) Petitioner contends the government was bound by the testimony of Mr. Hill, whom it produced.

There were approximately 75,000 rental units in the area. (R. 312.) Hill and Cly agreed to divide fifty-fifty whatever monies were received, regardless

of who received them. (R. Tr. 392.) Mr. Hill used the Cly offices. The fee made for their services were when they had to go out and examine big units and make up big and considerable paper work, and where they thought they could therefore do some good. (R. 283, 377.) Charges were made in approximately ten percent of the cases handled by Hill and Cly. (R. 283, 378.) Cly estimated that 150 to 200 cases were handled free and there were 15 to 17 cases where fees were charged. (R. 378.) Cly testified that there may have been a few more than those named in the indictment. (R. 470.) No record was kept of the cases where charges were made (R. 378, 483). Hill and Cly never divided any of the monies with any other board members. (R. 282.) Both tenants and landlords came to Cly's office for assistance. (R. 337, 470.) The percentage was approximately sixty percent landlords and forty percent tenants. (R. 250.) He testified no charges were ever made to a tenant, but landlords more or less voluntarily paid them, and they accepted money from the landlords. "We had to do something to keep living. Yes we accepted." (R. 470.)

In connection with their operations, Cly and Hill would visit and inspect the properties involved in a particular case in which a fee was ultimately collected, and then would check the comparable rentals on adjoining properties at the Los Angeles Rent Director's office. (R. 256, 391.) The duties of an Advisory Board Member did not require them to personally inspect the property. (R. 269.) The other three members of the

Advisory Board No. 8 inspected property only half of the times at the most. (R. 393, 282.)

Cly and Hill drove down to the Area Rent Director's offices at 1206 Santee Street, Los Angeles, practically every day. Cly's car and gasoline were used because Mr. Hill, the Chairman, did not have a car, and Cly would drive Hill to Los Angeles and bring him back. (R. 391.) The Government did not reimburse Cly for the use of his car or his gasoline, and there were no provisions for such. Cly testified that money was taken only after the property had been checked over, comparable rents noted, and he and Hill felt the increase was justified, and they knew how much work had to be done. (R. 410-411.)

The Advisory Boards had no power of their own. The applications were relief by a landlord or tenant under the Rent Control Act and had to be filed directly with the Los Angeles Office of the Area Rent Director. (R. 308.) The Los Angeles office would, in the normal course, then process the application, make its own inspection and then decide upon the order that should then be issued in the particular case. Generally thirty to sixty days elapsed between the filing and the resulting order. (R. 209.) If the resulting order from Mr. Koepke's office was unsatisfactory to the petitioner such aggrieved person could appeal to his local rent advisory board. (R. 306.) The intention when the Local Advisory Boards were set up in 1947 was for the Area Rent Director to have an opportunity to pass on a petition before the matter ever came before an

Advisory Board. (R. 307.) It was never intended that an Advisory Board should file petitions on behalf of tenants or landlords. The function of the Local Advisory Board was purely to advise and make recommendations to the Area Rent Director in hardship cases, (R. 307, 308) and not in others. If these recommendations were anywhere reasonable after independent inspection and examination of its own, the Koepke office generally followed them. (R. 309.)

The applications for relief by a tenant or landlord could be brought before the Local Advisory Board for consideration and recommendation by either having the petitioner, by letter, request the Clerk of the Board to have the *Board* review the case (R. 308) or by having a member of the Board request the Clerk of the Board to place a particular case on the agenda for their next regular meeting. (R. 309.) Cly and Hill requested certain matters be placed on the agenda for consideration and Mrs. Luscher, the Clerk and Secretary, would do so. (R. 329, 250-258.) Mr. Hill testified that he and Cly requested that deserving cases be brought before Advisory Board No. 8 and in every instance where the request was made they were granted by Mrs. Luscher. (R. 258, 271.) Mr. Cly testified he never made an unfavorable recommendation on a matter in any case where a fee had been received. (R. 465.) Fees had been accepted before the matters came before the Board; before they were called for a meeting. (R. 465, 421, 434, 435.) Hill testified that at the Board meetings he would state why the recommendations were

made, and the members would look it over and decide whether they should get a raise. (R. 214.) Chief Director Koepke accepted Mr. Cly's resignation on January 13, 1949, effective January 15, 1949, (R. 457) which followed a conversation between Cly and Koepke regarding Cly's acceptance of fees. (R. 523, 524, 317, 318, 319.)

After the work became very burdensome, members of the Advisory Board No. 8 tried to resign but Cly said they tried to hold the Board together. Only Hill and Cly resigned in early 1949. (R. 471.)

The fees accepted and the properties involved and dates and the counts to which they relate were as follows:

Count No. 3—12/6/48, Mr. & Mrs. Claude W. Chapman, Montezuma Apartments, 407 Ocean Front Wall, Venice, $50.00 (check).

Count No. 4—11/17/48, Mr. & Mrs. Harry Neiditch, 1341 Fourteenth Street, Santa Monica, $250.00 (check).

Count No. 5—6/29/48, Don Greco, 126 Palisades, Santa Monica, $300.00 (cash).

Count No. 7—11/20/48, Norman Westcoatt, Executor, 102 Nowita Place, Venice, $100 (cash).

Count No. 8—9/4/48, Mrs. Mabel Preston, 1418 Eighteenth St., 1423 Nineteenth St., 2480 Santa Monica Blvd., 543-549 Lincoln Blvd., Santa Monica, $90.00 (cash).

Count No. 9—9/4/48, Mrs. Frances Barker, 1344-1348 Eighteenth St., Santa Monica, 543-549 Lincoln Blvd., Santa Monica, $45.00 cash.

Count No. 11—7/15/48, Mr. & Mrs. Frank Cohen, 209-209½ Clubhouse Drive, Venice, $50.00.

For accepting part of these checks and cash as fees Cly was charged with receiving a bribe in his "official capacity" in a matter pending before the Advisory Board. The charges against Hill, the Chairman of the Board, who collected the monies and received half, were dismissed.

COUNT THREE—On December 6, 1948, Mr. and Mrs. Chapman, owners of a property known as the Montezuma Apartments at 407 Ocean Front Walk, Venice, California, had a telephone conversation with Mr. Hill, President of the Board, regarding their property. At that time there was *no matter pending before Advisory Board No. 8.* (R. 23.) Mr. Hill came to their apartment twice. They went to Mr. Cly's office and Mr. Cly and Mr. Hill were there. Mr. Chapman had dealings with Mr. Hill. He brought all his O.P.A. papers to the office, and he said he was asking for a raise in rent. (R. 24.) He had not made any application to the Board, but he came to the office to provide those papers to Mr. Hill. Mr. Hill said the office would make out the papers, Mr. Hill said there would be quite a bit of work on the papers and it would cost $10.00 an apartment for each of the applications to make them out. (R. 28.) He said there was work to be done on it. (R. 28.) Mr. Chapman then made out

a check for $50.00 to Mr. Hill. Mr. Chapman testified that the money was not given to bribe them; that the payment was for the work. He said that there would be quite a bit of work connected with it, or something to that effect. (R. 31.) He said he did it on account of they say they woud have to draw the papers up anyway and the apartment house association more than likely woud charge them something for drawing up the papers, and he eventually gave them the $50.00. (R. 31.) After the papers were filled out, an inspector went down to his place. (R. 32.) Nothing had been presented to the Board or was before the Board in its official capacity.

COUNT FOUR: In Count Four relating to property owned by Mr. and Mrs. Harry Neiditch, 1341 Fourteenth Street, Santa Monica, California, Mr. Neiditch testified that he had never had any contact with the petitioner Mr. Cly; that he contacted Mr. Hill (R. 69); that he never talked to Mr. Cly (R. 70); Mrs. Neiditch said she never had any dealings with Mr. Cly (R. 71); one time Mr. Cly walked through the office,—did not participate in any conversation; all her discussions were with Mr. Hill (R. 73). Mr. Hill received $250.00 from Mr. and Mrs. Neiditch.

COUNT FIVE: Don Greco owned the property at 126 Palisades, Santa Monica, California. Greco never had any contact with Mr. Cly prior to the time that Mr. Cly came over to his house with Mr. Hill. Mr. Hill brought him over (R. 169), and Greco talked about the property in the presence of Mr. Cly (R. 17, Vol. 2,

Tr.). Mr. Cly said he thought it was well worth the raise that Mr. Greco was trying to get; that Mr. Greco wasn't getting enough rent for the bungalows (R. 70); Mr. Cly said "I think you should be able to get a raise on it because the property is a nice piece of property." The conversation went along the line that the property was well worth the raise and he thought Mr. Greco should be able to get $100.00 or $150.00 a month rent and Mr. Greco made the remark that he didn't want that much; that he wanted a reasonable raise and he said that he would help him and at the conclusion Mr. Greco was informed that it would cost some expense money; Mr. Greco asked him how much and they said it would amount to $300.00 both for the papers and expense of that kind (R. 71). He said that he paid Mr. Cly $300.00. At that time he didn't know Mr. Cly was a member of the Board (R. 172). He presumed Mr. Hill was; he didn't know he was; he thought Mr. Hill might have something to do with it (R. 172); he never went to their offices, didn't have any further contacts with the petitioner, never saw him after that time. He got an increase per bungalow from the Housing Expediter but never used that increase on the tenant. He got permission from the Housing Expediter to raise the rent $5.00. He had six bungalows (R. 174).

Quite a few months later, probably three or four months later, he got the increase by the Housing Expediter there was an inspection made of the premises. He doesn't remember whether it was by a lady or gentleman. It was after this meeting with Mr. Cly and Mr. Hill (R. 175). He wasn't there at the time of the

inspection. Mr. Hill and Mr. Cly looked over the premises very carefully when they first came there (R. 174); he had known Mr. Hill for some time prior to that time; Mr. Greco had a bar and he didn't know if he had met Mr. Hill at the bar or not. He was in Mr. Hill's office once or twice (R. 176). He had a little office and printing office in Santa Monica (R. 176); he didn't know where Mr. Cly's office was. Some papers were prepared and he brought the papers down to sign (R. 177). The papers were brought by Mr. Hill. He thinks Mr. Hill prepared the papers. (R. 177) Nothing was ever said at any time about influencing the actions of the Board with relation to the rent at the time of the payment of the money (R. 178); at no time did he have in mind that he was buying the favor of the local rent board in connection with his application (R. 178). He had no idea that the matter would even come up before the Board; he didn't know that Mr. Cly was a member of the Board; he didn't know whether Mr. Cly had the influence of the Board; he wasn't buying any influence, and he didn't offer him a bribe for any influence (R. 179); he didn't bribe them for their influence and that was farthest from his mind (R. 180).

Mr. Hill testified that he went over to Greco's place and went over all the apartments. He thinks Mr. Cly was with him but he might be mistaken on that (R. 189). He went over all of Greco's apartments and felt the man was justified in asking for his increase because he had a beautiful place and he drew up the papers for him and had the inspector come out and

look over his place. They permitted him an increase in the rent which was not in line with what he felt it deserved, but he felt it was better than nothing (R. 189). The matter came up before the Advisory Board and two other members of the Board came out and looked over the place, Mr. O'Brien and Mr. Smith (R. 190). They asked that the property be inspected. $5.00 a month increase was granted for six apartments. Mr. Hill wrote Mr. Koepke, the Housing Expediter, protesting that that was not enough. The matter did not come up before the Board until July or it could have been August 13 (R. 192). When the matter came up before the Board they all discussed, it, all gave their opinions because they were all Santa Monica people. Mr. Koepke, of the Housing Expediter's Office went out and looked at the property. It was their practice to either deny or recommend or concur in it. The inspectors went out. Mr. Hill accompanied them that day (R. 192). Recommendations were made for a $5.00 increase. Mr. Hill thought it was worth considerably more. Mr. Hill received $300; Mr. Hill said he knew Mr. Greco for many years (R. 198); Mr. Greco asked if there was any way he could get the property increased; Mr. Hill thinks Mr. Cly was with him but he might be wrong.

Mr. Cly received some of the money (R. 193); Mr. Hill checked comparable rents and found that other properties not nearly as nice were renting for considerably more so he told Don Greco that he could get him an increase. Mr. Hill said Greco was "willing to pay

for our time and trouble and that the money represented the amount that we spent 'and I am going to continue to use the singular.' I came into Los Angeles and I looked over the record and I looked over what particular properties were renting for and he was way below the margin, in my opinion, especially comparing it with the nice place he has and he said he was perfectly willing to pay us for our time and trouble in doing that when we filed the papers or I filed the papers for him (R. 199). He said he filled out a paper that was a long drawn out thing, answered all the questions, etc., (R. 199). Mr. Hill prepared the papers. Mr. Cly has a real estate office and they used Mr. Cly's office in connection with the rent advisory board matters (R. 200). At the time the money was paid he knew the matter would come up before the board in the future (R. 199). Mr. Hill stated that nothing was pending before the board. He made out all of the papers, divided the money, half to Mr. Cly (R. 201). Mr. Hill did all of the typing and Mr. Cly, when they first found out it was all right to ask for expenses, etc. for doing this work (R. 202) knew the client. Mr. Cly denied he was present when Greco paid Hill the $300.00 (R. 499, R. 500).

COUNT VII.

Count seven charged receiving $100 in cash from Norman Westcoatt executor of the estate of Lily Dillon, deceased, regarding a property located at 1002 Nowita Place, Venice, California. Mr. Westcoatt testified that on November 20, 1948, he had some discussion with Mr. Hill (R. 130) at Mr. Cly's office, Mr. Cly being present. Mr. Cly told Mr. Hill to go out and look at the property, and from that time on Mr. Hill wrote the letters and carried on the business with him. (R. 131). Mr. Hill first came out and looked at the property and there were so many different forms that had to be filled out and different things, and it was so confusing and everything else, so I looked at the Venice papers and read about the Rent Board, and that is how I got in touch with the office down there. He asked where could he get those papers filled out and Mr. Cly replied that Mr. Hill makes out these papers (R. 132). He asked how much it would cost to fill out these papers as he was leaving to go out of town, and I asked what it would cost. Mr. Hill knew he had better go over and look at the property and that is when Mr. Hill came over and made out the papers, and I asked Mr. Hill what it was going to run me. He at no time ever discussed the matter with Mr. Cly. (R. 132, 133). He paid $100 in cash presumably to Mr. Cly. *$100 was to make the papers out for the eleven units.* When Mr. Hill came back, Mr. Westcoatt said there is so much red tape with these letters and papers and the hardship and the taxes I will just forget about it. (R.

138). He did his work in good faith and Mr. Westcoatt paid him for it. (R. 138). All that was said in that relation to the matter by Mr. Cly was "Well, we will do the whole job for $100, so I paid him." (R. 130). The dealings were almost entirely with Mr. Hill (R. 140) *who was told definitely and specifically that the $100 was for services in connection with Mr. Hill preparing the papers.* (R. 141) There was no discussion about any rent increase he would get. *He did not appear before the Board. At no time when he gave the $100 did he have in mind that he was paying for the influence of Mr. Cly as a member of the Rent Advisory Board No. 8 to give favorable action* (R. 142) nor to influence Mr. Cly's tions as a member of the Rent Control Board (R. 143). He did not know at the time Mr. Hill or Mr. Cly were members of the Advisory Board (R. 144).

COUNT VIII.

Count eight of the indictment charged Cly with asking and receiving $90 in cash from Mrs. Hazel Preston with intent that his action would be influenced thereby in favorably recommending to the Housing Expediter, a rent increase at 1423 - 19th St., and 2840 Santa Monica Blvd., 543, 549 Lincoln Blvd., Santa Monica, Calif. Francis Barker testified regarding count eight (R. 153). Mr. Cly introduced her to Mr. Hill. He paid $45 to Mr. Cly. (R. 157). $15 per unit for 3 units. He asked Mr. Cly what the $15 was for *and it was for the paper work* (R. 161). *He didn't know that Mr. Cly was a member of the Advisory Board* (R. 161). It was her idea *of the charge for the paper work.* (R. 162). *She had papers made out, never attended any Board meetings. Nothing said with reference to influencing Mr. Cly upon the outcome of the application* (R. 165). *It was purely for paper work as we understood it* (R. 165).

COUNT IX.

That Count 9 charges the recept of $45.00 from Mrs. Frances Barker, who also has a sister by the name of Mrs. Preston, the Mrs. Hazel Preston referred to in Count 8. She said she and her sister were handling the transaction at the time, and her testimony, as set out in Count 8, also relates to Count 9.

Mrs. Murray Spencer, Geraldine Spencer, (R. 77) testified as to count 8 that she had a conversation with Mr. Cly over the telephone and asked him if she could see him and told him that she had the deed to the property—that it finally had been vacated and she was keeping it vacated as a sort of one man's stand against the rental ceiling, that she had it vacated for six months and then she decided to redecorate and rent it. Mr. Hill and another man came up and looked at the place. (R. 80). It was in June of 1948 that she went down to Mr. Cly's office, she saw he was a general contractor and he was on the Board, and felt she had a fine story and wanted to get a better rental before she put it on the market (R. 81). She knew he was going to try to help her get a better deal but with all the money she had spent on it as far as redecoration could be used as added rental, because she had spent a lot of money (R. 82). She doesn't remember what kind of arrangement she made. She paid him $200.00, and thinks her house was decontrolled before *she gave him the money, she can't remembr when she gave it to him.* (R. 83). She couldn't remember whether she paid the money before of after the decontrol (R. 86), Mr. Cly never

told her he would use his influence as a member of the Board to get her house decontrolled, nothing like that intimated. (R. 86). If the $200.00 was just a gift in services rendered, she really didn't know. (R. 87). She never believed she filed an application with the Office of the Housing Expediter on the 19th of June, 1948 asking that her property be decontrolled. She just signed it and didn't file it. She signed it in Mr. Cly's office. (R. 87). It was prepared by someone else and handed to her by Mr. Cly. *She never appeared before the rent control board.* The copy came back marked filed. She made a point of paying cash for anything that was to be done and just asked for a receipt. (R. 89).

COUNT XI.

Count Eleven charges accepting and receiving the sum of $50.00 from Mr. and Mrs. Frank Cohen, with the intent that their acts would be influenced thereby in favorably recommending to the Housing Expediter that rent increases would be authorized on certain properties located at 209 and 209½ Club House Drive, Venice.

Rose Reubens, who was formerly Mrs. Frank Cohen, (R. 122) testified that she had some rental property in Venice located at 209 and 209½ Club House Avenue, Venice. She didn't know whether her husband ever discussed their property with Mr. Cly. She was never with him when he discussed this with

Mr. Cly. He subsequently died, on October 19, 1950. (R. 124).

The evidence fails to show that Mr. Cly accepted and received the sum of $50.00 from Mr. and Mrs. Frank Cohen with the intent that his action should be influenced favourably recommending to the Housing Expediter that rent increases be authorized at 209 and 209½ Club House Drive, Venice. There is no evidence that the matter was then pending before the board in its official capacity.

QUESTIONS PRESENTED BY THIS WRIT

1. Whether the defendant who was charged with asking and receiving a bribe in violation of Sec. 207, Title 18 is properly tried and convicted when the indictment charges the asking, receiving of a bribe. "this being a matter then pending before *them* in their official capacities" or singularly "a matter then pending before *him* in *his* official capacity" when there was nothing officially pending before the petitioner as a member of Rent Advisory Board No. 8.[c] He was charged with one sub-section of Title 18, Sec. 207 and Title 18, Sec. 202 and tried on another. Whether such procedure violates due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and conflicts with *Cole v. Arkansas,* 333 U. S. 196.

2. Whether a local rent advisory board is an "Office" of the United States. Whether a person,

[c]The statutes make separate offenses of matters which are "pending" and those which may be brought before him in his official capacity.

selected for an honorary position on a "rent advisory board" which has no power or functions to act in matters but only to make a recommendation as a board, can receive compensation for his private time, the use of his office space, his stationery, his gasoline, when no statute or rule or regulation forbids it, and be charged for that reason with asking and receiving a bribe because he takes such funds for reimbursement. Whether such a person is an "officer" of the United States "within the meaning of Title 18, Section 207 U.S.C.

3. Whether an indictment states a public offense against a person in charging that he is a public officer where the indictment merely charges that he "signed" an oath of office as a member of said Rent Advisory Board and does not state that he *duly* and *regularly took* the oath as required by Title 5, Sections 16 and 18. If such person actually then became an official of the United States and was or could act in his official capacity until he did take such an oath.

4. Whether such a person, not having officially taken the oath, and being a private citizen holding only an honorary post was or could be guilty of asking and receiving a bribe in his "official capacity" and comes within the scope of Title 18, Section 207 or 202.

5. Whether there was any evidence to support any count on which the petitioner was convicted and whether the evidence is entirely insufficient, and contrary to law.

6. Whether the court erred in admitting evidence of other conversations and other transactions not

amounting to an offense, particularly the testimony of Earl J. Templeman (R. 91) which was highly prejudicial but related to no offense.

7. Whether testimony which shows no other offense or other actual transaction is admissible for the purposes of showing 'at least that Mr. Cly was susceptible of accepting a bribe'.

8. Whether the trial court did not err in refusing to strike the evidence at the close of the government's case. (R. 101, R. 363, 364).

9. Whether the trial court did not err in its rulings in the presence of the jury to which an exception was taken when he said, "We know that when anybody is in government business, we do not have to pay them a fee for them to do their work." Whether this was a comment and a misstatement of fact to the jury which in itself fatally affected the verdict. Whether other numerous one-sided comments by the trial court, some misstating facts and others misstating the law, fatally affected the verdict and require reversal. These are set out in the appendix to our brief.

10. Whether the court erred in instructing the jury as to the entire statute on which the petitioner was being prosecuted whereas he was only prosecuted on one phase of the statute, namely whether he actually received a bribe in a matter then *pending* before the board in its official capacity, whereas the statute provides a series of separate offenses including the asking, receiving of money in matters which may come

before him under separate portions of the statute which were or could be separate offenses. The giving of such an instruction was highly prejudicial error.

11. Whether the comment by the trial court to the jury was so one sided as to constitute unfair trial in violation of the Fifth Amendment of the Constitution of the United States.

12. Whether the trial court erred in instructing the jury "nothwithstanding this individual agreed to make no charges he nevertheless did" (R. 71).

13. Whether the trial court erred in instructing the jury as to the whole of a statute when only a part of it is involved and whether such instruction is a misdirection of the jury is error so fundamental as to require a reversal on the face of the record.

14. Whether the court erred in instructing the jury only on a statute (Title 18, Sec. 207. (1946 Ed.)), which statute was different than the one which was in existence at the time of part of the alleged offenses. Title 18, Secs. 202, effective Sept. 1, 1948.

15. Whether an offense of bribery is made out where the uncontradicted evidence shows that there was no intent upon the part of the person giving the money, or the alleged bribe giver, to influence any official action, and whether such an offense requires proof of an intent both upon the part of the alleged bribe giver and bribe receiver to influence official action, without which no crime is made out.

16. Whether the mere receipt of petty sums of money to reimburse one holding an honorary position by the use of his office, his stenographer, his gasoline and his time constitutes bribery where the statute dues not forbid such private activities.

17. Whether the government when it uses as its witness the Chairman of the Board who was jointly indicted with the petitioner, and whose case was dismissed, and he testifies that they received permission from the Local Housing Expediter to make the charges whether the government is bound by his testimony and the effects of it is to absolve the petitioner also.

18. Whether the receipt of a "check" comes within the meaning of Title 18, Section 207 U. S. Codes.

19. Whether the court of appeals of the Ninth Circuit erred in deciding the case based upon existent specifications without passing upon each point separately and whether the court of appeals has put its Rule 20 which existed prior to the rules for the District Courts of the United States above the changed requirements and whether the Court of Appeals has put its Rules of the Court above the administration of justice.

REASONS FOR GRANTING THE WRIT

I

Important questions of criminal law and procedure which have not been, but should be decided by this Honorable Court are presented by this writ.

The decision of the United States Court of Appeals for the Ninth Circuit is in conflict with this court's decision in *Cole v. Arkansas,* 333 U. S. 196, and involves a denial of due process of law guaranteed by the Fifth Amendment in that the petitioner was charged in one sub-section of Title 18, Section 207 and tried on another sub-section. The decision is also in conflict with *U. S. v. Greene,* decided by the second circuit as to whether a "check" comes within the meaning of Title 18, Section 207 U. S. C. and the conflict should be resolved by this court.

II

The case involves other important questions of criminal law which have not been heretofore decided by this Honorable Court, namely, (A) whether a person appointed to an honorary local post by the Housing Expediter is an "officer" of the United States within the meaning of Title 18, Section 207. Whether such person giving his time, his office, his telephone and his stationery may receive private compensation for the same where no statute, rule or regulation forbids it, or whether he is thereby guilty of receiving a bribe, as an "officer" of the United States. Where none of the

persons giving checks or cash did so with any intent to influence petitioner. Whether "bribery" requires joint intent of giver and receiver.

(B) Whether an appointment which charges that a person merely executed an oath in writing is a *public officer* within the meaning of the word "officer" in Title 18, Secs. 207 or 202, where there has been a non-compliance with the requirement that before a person is an "*officer*" of the United States he must "take" an oath of office and not merely execute a writing. Whether Section 207 of Title 18 was meant to apply to such a person.

III

The case involves important questions of criminal law upon which this court should exercise its supervisory power on appeal in criminal cases, particularly:

(a) Where an indictment charges a specific portion of a disjunctive statute under which the accused is charged whether the court may instruct the jury on the *whole* statute which involves portions of the statute under which he is *not* charged, and whether such proceedings is misleading and misled the jury to the prejudice of the accused;

(b) Where the court's one-sided comments and at times factually erroneous comment on the evidence to the jury has destroyed the defendant's right to a fair trial and rendered vain the privilege of the accused to testify in his own behalf;

(c) Whether the trial court erred in reading to the jury as the law involved in the case an old statute, and not reading the law which had been amended, and under which petitioner was also tried, but regarding which the jury was never informed.

(d) Where the uncontradicted evidence shows that the persons giving the money had no intent to influence any official or other action of petitioner a crime is not made out since the crime of bribery requires a specific intent on the part of both the bribe giver and the bribe receiver, and requires joint participation with that objective. None existed here.

(e) Where there is no matter pending before a board a conviction may not be had under another sub-section of the statute which might have applied had the charge been brought under that sub-section.

(e) Whether a Court of Appeals can fail to rule on each of the points raised in appellant's brief in the court of appeals because of an old rule which existed prior to the New Rules of Criminal Procedure of this Court governing appeals.

The petitioner stands convicted in violation of Due Process of Law guaranteed by the Fifth Amendment to the Constitution of the United States in that he was charged with violation of one sub-section of Title 18, Section 207 and tried on another, sub-section not charged in the indictment. Furthermore, the court failed to instruct the jury on the statute as amended and existing at the time of part of the transactions in-

volved. Such procedure and proceedings voilate due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. The decision of the Court of Appeals is in conflict with the decisions of this Honorable Court and the courts of other circuits and a hearing should be granted, and the judgments below reversed.

We pray for certiorari and reversal of the judgments below.

Respectfully

MORRIS LAVINE.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952, No. .....

MONTE G. CLY,)
Appellant,)
vs.)
UNITED STATES OF AMERICA,)
Respondent.)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Fred M. Vinson and to the Honorable Associate Justices of the Supreme Court of the United States.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254(1) and the Rules on Appeal in criminal cases established by this Honorable Court.

The judgment of the Court of Appeals was rendered on January 29, 1953. A petition for rehearing was duly and regularly filed in that court and rehearing was denied on March 3, 1953. The Petition for Certiorari is filed within thirty days of the denial of the rehearing, and the time extended by Justice Wm. O. Douglas.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is in 201 F. (2) 806. It is to be found on pages 47 of Volume 1 of Proceedings had in the United States Court of Appeals.

STATUTES INVOLVED

Statutes involved and Statement of facts are incorporated by reference from the petition.

We adopt the Statement of Facts set out in our Petition for Cetrtiorari and brief in the Court of Appeals as though fully set forth here, with the following additions:

The petitioner herein, a real estate broker and general contractor, having offices at 32 Avenue 17, Venice, California, was named to an honorary appointment to Rent Advisory Board No. 8, Los Angeles Defense Rental Area, by the Governor of California, and the Housing Expediter. This Board was not an "office" of the United States. No oath of office was administered orally to Cly but he was given a paper which he signed and executed, but not before any official who was authorized to take any oaths. He was in any event never an "officer" of the United States.

The publicity which followed the announcement of naming him caused his private offices to be innundated with people; his private telephones to be flooded with phone calls, and was called day and night by both landlords and tenants—about sixty per cent were landlords and forty per cent tenants. (R. 250). People asked how to fill out the complicated forms, and it was necessary to use his private stenographer and his own time to assist them and in some cases he and another appointee, Mr. Lindsey T. Hill, looked at the houses or apartments involved and drove to the places in their

own cars and expended their own gasoline and their own time.

Mr. Lindsay T. Hill asked the Local Housing Expediter, Mr. Koepke, if charges could be made for services rendered in filling in the forms and other papers. Mr. Koepke said it was all right. (R. 253, 254). Mr. Hill, who had been made chairman of the Board advised Mr. Cly (R. 253) and they began making small charges after he (Mr. Hill) got the green light from the boss. (R. Tr. 255). Mr. Cly also asked Mr. Koepke. Mr. Hill who was a government witness testified:

> "At one time we asked Mr. Koepke. Mr. Cly and myself asked—said that we had a lot of people wanting to file papers and so forth, and what should we do, and Mr. Koepke said, 'Why, charge them for it, of course, for your time and trouble in coming down here.'
>
> Q. Did he say how much to charge?
>
> A. No." (R. Tr. 216).

As a result the following charges were collected and form the basis of the indictment on various counts: $50.00 check to Mr. & Mrs. Claude W. Chapman, Montezuma Apartments, 407 Ocean Front Wall, Venice (Count 3), December 6, 1948; for which a check was given, $250.00 (check) to Mr. and Mrs. Harry Neiditch, on November 17, 1948, in reference to a place at 1341 Fourteenth Street, Santa Monica; $300.00 for Don Greco, (Count 5),at 126 Palisades, Santa Monica; $100.00 to Norman Westcoatt, Executor, on November

20, 1948, at 1002 Nowita Place, Venice (Count 7); $90.00 to Mrs. Mabel Preston, 1418 Eighteenth Street, 1423 Nineteenth Street, 2480 Santa Monica Blvd. and 543, 549 Lincoln Blvd., Santa Monica, September 4, 1948; $45.00 to Mrs. Frances Barker, September 4, 1948, at 1344-1348 Eighteenth Street, Santa Monica and 543-549 Lincoln Blvd., Santa Monica, and $50.00 to Mr. and Mrs. Frank Cohen, July 15th, 1948, 209-209½ Clubhouse Drive, Venice, (Count 11).

None of the people who gave the checks or money testified they had any intent to influence the actions of Mr. Cly. In fact they testified they had no such intent. Some of them gave the money to Mr. Hill alone. Mr. Hill's case was dismissed and he was a witness for the government. The government vouched for his credibility by putting him on the stand.

Petitioner is under sentence of 18 months in prison and fines totalling $2,555.

SUMMARY OF THE ARGUMENT

A local rent advisory board is not an "Office of the United States" within the meaning of Title 18, Sec. 207 U. S. Code. The appellant was named to an honorary post of being a Member of local Rent Advisory Board No. 8 (which had no powers of its own, except to make recommendations). Petitioner was never an officer "within the meaning of Title 18, Sec. 207 U. S. Code. never took an oath of office as provided by Title 5, Sections 16 and 18, but merely signed a paper in front of a liaison officer of the Housing Administration who was not authorized to "take" or administer oaths. Through the newspaper announcements petitioner's private office was flooded with people asking advice and assistance and use of his private facilities, his private telephone, his private stenographer, etc. After the Chairman of the Board, Mr. Lindsay T. Hill, and petitioner inquired from the Local Housing Expediter what they could do about the expenses and were advised that they could make charges, small charges were made individually to these people. Some of these people gave small checks.

None of the people gave the checks or money with any intent to influence the official actions of petitioner, according to their own testimony. Some of them did not see him and others did not even know that he received any part of any fees which were given to Lindsay T. Hill.

The offense requires an intent to corrupt and to be corrupted on the part of alleged bribe giver as well as

receiver. There was no such proof. Judgments of acquittal should therefore have been entered in favor of the defendant.

There was at no time any matter pending before the Board in its official capacity as alleged in each of the counts of the indictment, and the proof fails to show any such matter pending before the Board in its official capacity.

Each count of the indictment alleged that the check or money involved was received with the intent that his action would be influenced thereby in a matter pending before him in his official capacity. There was no evidence that any money was given with that intent or that any matter was "pending." Some counts alleged violation of Title 18 U. S. Code Section 207, others Title 18 U. S. Code Section 202. But, Title 18 was amended by Congress and became effective September 1st, 1948 to add Title 202. None of the matters involved were before the Board and pending before petitioner *"in his official capacity"* as such member of the Board. Although this was the allegation in the indictment under one subdivision of Title 18, Section 202, the petitioner was not tried thereon, but was tried under other subsections of 207 and 202, which provides that, "Whoever, being an officer of the United States, with intent to have his decision or action on any question, matter, cause, or proceedings which *may at any time be pending",* which was not a subsection under which the petitioner was charged in the indictment. Such a trial violated defendant's rights under the Fifth Amendment.

The court also gave the jury instructions as to the whole statute involved and not merely that portion under which the accused was charged in the indictment, thus misleading the jury as to the accusation against the petitioner. The petitioner was therefore charged with one section of Title 18 and tried on a section not charged, in violation of due process of law guaranteed by the Fifth Amendment, and the decision below is directly contrary to the case of *Cole v. Arkansas,* 333 U. S. 196. The trial court's comments to the jury were not supported by facts or law. See Appendix A.

The indictment fails to charge that the appellant was an *"officer"* acting under the authority of any department or *office of the government thereof* (Title 18, Section 207 U. S. Codes) or that the petitioner was an officer acting under the authority of any *department or agency thereof.* (Title 18, Section 202). (Amended effective Sept. 1, 1948) or that the appellant *took* the oath of office of any *office* of the United States Government, or that Rent Advisory Board No. 8 of the Los Angeles Defense Rental Area is a department office of the government, and therefore fails to state an offense against the United States of America. Such a person is not an "officer" of the United States.

Congress did not intend Title 18, Section 207 or Section 202 *of Title 18, U. S. Code* to include "checks" (*U. S. v. Green,* 136 Federal 618, 651.) The decision in the instant case is, therefore, in conflict with the Second Circuit and this Court should grant a hearing and resolve the conflict and to determine whether the

indictment in any of its counts states an offense against the laws of the United States.

In order to correct the deficiency in the Statute as it existed under Title 18 Section 207 Congress adopted Title 18, Section 201, and inserted the word "check" in Title 18, Section 201, which became effective September 1st, 1948.

The trial court erroneously instructed the jury under Section 207 of Title 18, which was non-existent and had been changed by Section 202 of Title 18, which the court did not read to the jury or give to the jury in saying:

> "In other words, during the course of the time Mr. Cly was acting as a member of the Board the law was changed but not substantially changed so far as the law is concerned in this case. I will read to you only Section 207, which is entitled 'official accepting bribe.' " (R. Tr. 578).

It was necessary to instruct the jury as to the law which actually existed. *Screws v. U. S.*, 325 U. S. 91, 104, 107. *Cole v. Arkansas*, 333 U. S. 196.

The court further erroneously instructed the jury that:

> "under the circumstances here presented the defendant in his capacity as a member of Rent Advisory Board No. 8 is a person acting for or on behalf of the United States in an official capacity, within the meaning of Section 207, Title 18, U.S.C." (R. Tr. 581).

Thus, taking away from the jury the issue as to whether the defendant was acting in an official capacity and was acting by virtue of authority of any department or office of the government. This was one of the issues in dispute.

Petitioner contends that he was not an officer of the United States (acting under or by virtue of the authority of any office of the government) and that nothing that was done was with intent to have his decision or action on any matter pending before him in his official capacity influenced thereby. If he was not an officer of the United States *he could not* have violated *Title,* 18 Section 207 U. S. Code.

ARGUMENT

I.

The appellant was charged with accepting and receiving a bribe with intent that his action should be influenced thereby. Some of the people did not give the check or money to petitioner, but to Lindsay T. Hill, some of the witnesses did not even know petitioner or his supposed position or "official character," an essention element in the offense. None of the givers gave with any corrupt intent. The crime of bribery requires two participants in the corrupt intent to influence the action of the official, and to be influenced.

In the instant case, the uncontradicted evidence is that none of the persons who gave checks or money gave it with any intent to influence any official actions, but only in compensation for personal services rendered

in making out forms, typing, inspecting properties, etc. The crime of bribery, like the crime of conspiracy, under the facts of this case requires at least two participants upon the same corrupt purpose—the corrupt intent of the both parties being essential to the offense. It requires a bribe giver and bribe receiver with knowledge upon the part of the giver regarding the official character and proposed actions of the receiver. When the uncontradicted evidence shows that this did not exist the crime is not made out. The gravamen of the offense is the corrupt prior understanding or agreement between giver and receiver. None existed here.

State v. Woodward, 182 Mo. 391; 103 Amer. State Rep. 646;
Egan v. U. S., 287 Fed. 958;
Peo. v. Coffee, 161 Cal. 433;
Harris v. U. S., 8 F. (2) 841;
Peo. v. Sheffield, 108 Cal. App. 721;
Peo. v. Keyes, 103 Cal. App. 624, 630;
U. S. v. Dietrich, 126 Fed. 664.

In *Robinson v. U. S.,* 32 F. (2) 505 the writer of the opinion expressed himself as follows:

> "The writer is of the opinion that the bribe inhibited by the law (Sec. 134, Criminal Code; 18 USC Sec. 24) under which this indictment is drawn, requires corrupt conduct upon the part both of the giver of the bribe and of the one who receives it." (32 Fed. (2) 506-507). While the case was reversed later on other grounds and the opinion modified with two judges differing on the

above proposition, the writer of the main opinion adhered to the views expressed above.

The question is one of great importance in the administration of criminal justice, and has not been decided by this Honorable Court.

Clark v. U. S., 102 U. S. 322.

II.

LOCAL RENT ADVISORY BOARD NO. 8 OF THE LOS ANGELES DEFENSE RENTAL AREA WAS NOT AN "OFFICE" OF THE GOVERNMENT OF THE UNITED STATES WITHIN THE MEANING OF SECTION 207 OF TITLE 18, U.S.C., UNDER WHICH THE PETITIONER WAS CHARGED, AND THE ONLY SECTION UNDER WHICH THE COURT INSTRUCTED THE JURY. PETITIONER WAS NOT AN "OFFICER" OF THE UNITED STATES WITHIN THE PURVIEW OF THIS SECTION.

Examination of Title 18 under the Chapter on "bribery and graft" beginning with Section 201, shows that Congress only intended to include within its scope governmental bodies therein specifically named and has made specific provisions for other departments or bodies. When Congress enacted the Criminal Code in 1909, when Section 207 was adopted, such things as a Rent Advisory Agency, a volunteer agency of private citizens, was not forseen and certainly not in contemplation of the Act. Congress has felt it necessary to provide for specific sections to apply to bribery of other

bodies including the Federal Crop Insurance Corporation by subsection (f) of Section 1514, Title 7, U. S. Codes (1940 Edition, Agriculture) and the Federal Deposit Insurance Corporation U.S. sub-section (w) of Section 264 of Title 12 U. S. Code (1940) to the Reconstruction Finance Corporation by sub-section (e) of Section 616 of Title 15 U. S. Code (1940 edition, Commerce and Trade), and to the Home Owner's Loan Corporation by sub-section (d) of Section 1467 of Title 12 U. S. Codes (1940 edition—Banks and Banking). Congress has also found it necessary to specifically designate the word "check or order" in its revised sections and has added reference in its new code to exclude the bribery of customs officers and conform to the holding in *Curione v. United States,* 11 Fed. (2d) 471.

If Section 207 were meant to apply to such a body as here involved, Congress would not have found it necessary to have made specific reference in each of the other bodies that have been constructed since 1940. *U. S. v. Birdsall,* 233 U. S. 223, 58 L. Ed. 930.

The indictment, therefore, in each count thereof fails to state an offense against the laws of the United States.

McGrath v. U. S., 275 Fed. 294;
Burnham v. Hornaday, 223 N. Y. S. 750; 130 Misc. 207;
U. S. v. Van Wert, 195 F. 974;
Heaton v. U. S., 280 Fed. 697;
Canella v. U. S., 157 Fed. (2) 470.

III.

AN INDICTMENT WHICH MERELY CHARGES THE GIVING OF A CHECK FAILS TO CHARGE AN OFFENSE AGAINST THE UNITED STATES. THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS THEREFORE IN CONFLICT WITH A DECISION IN THE SECOND CIRCUIT, AND THIS COURT SHOULD GRANT A HEARING TO RESOLVE THE CONFLICT.

In several of the counts of the indictment, the petitioner was charged with receiving a check.

In *United States v. Green,* 136 Fed. 618, 651, it was held that a check given as a bribe was void, worthless and not a thing of value.

Under Section 207 of Title 18 as it existed, therefore, a check is not a thing of value. Congress recognized this in amending the statute subsequently but the court treated the case as though it existed at the time that Section 207 existed, and not as the Statute was amended subsequently thereto. Furthermore, the subsequent amendments could not apply to the count which occurred prior to the amendment to the Statute. Therefore, in charging that a check was given those counts of the indictment fail to charge an offense against the laws of the United States.

IV.

THE INDICTMENT FAILS TO CHARGE AN OFFENSE IN THAT IT ALLEGES THAT THE DEFENDANT MERELY SIGNED AN "OATH" BEFORE SOMEONE WHO IT DOES NOT ALLEGE WAS AUTHORIZED TO GIVE THE OATH, AND NO AUTHORITY WAS ALLEGED OR EVER SHOWN.

One is not an officer of the United States until he takes an oath of office, pursuant to Title 5, Section 16, and before a person authorized to give such oath, Title 5, Section 18. *In re Advisory Opinion to Governor,* 65 Fla. 434; 50 L. R. A. N. S. 365. It was not alleged that the petitioner took such an oath of office and that he ever became duly qualified in any wise if the position was that of an office of the United States. The indictment, therefore, fails to charge any offense against the petitioner.

The case involves an important question of criminal law in which this court should grant a hearing under its supervisory powers.

V.

The indictment charges that the petitioner "being an officer of the United States" received the check or money with the intent to have his decision on a matter then pending before him in his official capacity influenced. The petitioner, however, was not tried under this sub-section of Title 207 nor 202, but was tried under a sub-section which was not charged in the indictment, namely, that the matter might at any time be pending. At the time of the particular transactions involved in the indictment there was no matter then pending before the petitioner in his official capacity, or as any member of any Board or Body. The petitioner was therefore charged with one sub-section in the indictment and tried on another, and the decision of the Court of Appeals is therefore in direct conflict with *Cole v. Arkansas,* 333 U. S. 196, which holds that such procedure denies due process of law. Although that case was under the Fourteenth Amendment, the same ruling would hold under the Fifth Amendment to the Constitution of the United States.

We have in our Supplemental Brief in the Court of Appeals analyzed each of the counts of the indictment to show that none of the proceeds were received by the petitioner either in his official capacity or regarding any matter which was then pending before him in his official capacity as a member of a government board.

VI.

THE COURT ERRED IN ITS COMMENTS TO THE JURY, WHICH COMMENTS WERE ONE-SIDED AND CONSTITUTED UNFAIR TRIAL IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

An examination of the trial court's comments to the jury and our footnotes in Appendix A shows that these comments were all one-sided with an intent to influence them in bringing in a verdict of jury. The court did not leave to the jury the question of whether the petitioner was then an official of the United States or whether he was acting in his official capacity, in a department under the Government or the United States for the court told the jury that "under the circumstances of this case" such was a fact, and left little for the jury to do but to bring in a verdict of guilty.

This one-sided set of instructions violates the rules laid down by this Honorable Court in *Quercia v. United States,* 289 U. S. 466, 469:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight.' " (*Starr v. United States,* 153 U. S. 614, 626.)
>
> "Jurors are ever watchful of the words that fall from him, particularly in a criminal trial the judge's word is apt to be the decisive word."

And, in *Bollenbach v. United States,* 326 U. S. 607, 90 L. Ed. 354, the court said:

> "If it is a specific ruling on a vital issue and misleading, the error is not cured by prior unexceptional and unilluminating abstract charge. . . . ."

The comments of a trial judge on the evidence should be fair and give both sides of the case. It cannot cure the error by telling them to disregard his remarks.

The Court of Appeals for the Ninth Circuit did not consider this question because comments of the judge were not set up separately in the brief, although the entire record was before the court.

The comments of a judge are not instruction and its rules only require that "instructions" be set up in the brief. Nevertheless the Court of Appeals refused to consider it.

VII.

THE COURT IN ITS INSTRUCTIONS TO THE JURY STATED FACTS AND GAVE A ONE-SIDED COMMENT TO THE JURY WHICH NECESSARILY INFLUENCED THEIR VERDICT IMPROPERLY.

The trial court stated that the petitioner had *taken* an oath of office, under which oath there was a statement that he was to perform his services without any charge. No such oath was *taken* by the petitioner, and no oath of the United States that the statement that he was to perform his services without any charge.

The court further commented that "notwithstanding an individual who had agreed to make no charges, he nevertheless did."

The court in its instructions assumed the petitioner was guilty of taking a bribe when the person who gave it did not give it with any intent to bribe, and that the mere receipt of money was a bribe.

The court also destroyed in its instructions the credibility of Mr. Hill, for whom the government had vouched, by placing him on the stand, by his comments that the Local Housing Expediter could not authorize the defendant to "violate the law" and stating that the Local Housing Expediter had fired Hill and the petitioner. Such comments fatally infected the trial procedure.

The court of appeals avoided passing upon the many important issues in this case, by merely stating that its Rule 20, regarding specifications of errors, had not been complied with. Although the Court of Appeals opinion states that there were eight paragraphs of the so-called specification, there were only five specifications of errors in the Court of Appeals and none of them contain eight specifications. Nor is there a ninth, tenth, or eleventh paragraph of a specification. There were five specifications of errors, some of them containing two or three paragraphs. Nevertheless the rule of the Court of Appeals provides that if there is a noncompliance with Rule 20 that the Clerk shall not accept the briefs but shall notify the court and parties. In the instant case, the briefs were filed and the case set down for oral argument. This constituted a waiver of any defect, if any existed, in the briefs of the Court of Appeals; and the case went on to oral argument, at which time court asked both the government and defense counsel to point out any regulation which might cover the conduct of the petitioner here, to show, if it could show, that he was acting in his official capacity in any matter then pending before the Board, when the monies were received. Both counsel for the government and for the petitioner spent considerable time in this research and wrote letters to the court regarding it. The learned Judge who wrote the opinion for the Court of Appeals thereafter became ill and the matter pended for some time before the opinion and decision were reached in the case. The opinion of the Court of Appeals makes no comment upon this important issue

which has been fully argued in our briefs in that court and in this court, but undecided by the opinion of the Court of Appeals except the one comment that it found no reversible error, judgment affirmed.

We respectfully submit that the Court of Appeals has not fully and fairly considered the important questions which we have raised herein.

. . .

We have set up in this brief all of the comments of the judge as an appendix to our brief. We have also set up other instructions which we deem to be erroneous on the fundamental law of the case. *(Screws v. U. S.,* 325 U. S. 91.)

The Court of Appeals erred in not considering all our questions on the basis of the arguments made before it. In this case the court of appeals set up its rules above the requirements of justice. If there had been any omissions in compliance with its rules, that court waived it in holding oral argument and hearing the arguments of counsel thereon and requesting counsel to see if it could find any statute or regulation which might cover the situation in which the petition was found.

Rule 20 of the Rules for the Ninth Circuit provide that if there has been a noncompliance with that rule, the Clerk shall not file the brief. The briefs were filed, however, and contained five specifications of errors, broken down into two or three sub-divisions in some of the specifications.

The court of appeals was factually in error in holding that there were several specifications. We were at a loss to understand how the Learned Judge who wrote the opinion arrived at this mathematical deductions and comments.

Rules of court are made to aid justice, not defeat it. The Court of Appeals failed to pass on many important and essential issues in the case and this Court should exercise its supervisory power in that respect.

The Appendices which follow contain the trial judge's "comments" with footnotes on how both facts and law were misstated to the jury.

We pray for certiorari and reversal of the judgments below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

Appendix

Appendix

APPENDIX A

Comments of the Trial Judge on the Evidence. (Statements unsupported by evidence or contrary to evidence are Italicized.)

In over 10 years that I have been on the bench I have never commented on the facts in any case but I felt in this case I should make some comments, but any comments I make I want the jury to understand you are not bound by those comments. I could tell you that I believe the defendant is guilty or not guilty but it is your duty in the exercise of your judgment as jurors to absolutely disregard such comments.

I am making these comments in order to help you arrive at a just verdict. In the first place there is no dispute that we have one man here who has *taken*[1] an oath of office to faithfully perform his duties as a member of the rent advisory board. *And it was also contained in that same statement that he was to perform those services without any charge.*[2] And then we have evidence, undisputed evidence that charges were made and the only dispute between the parties is whether this money was paid with the intent to influence his decision or action on any question pending before the rent advisory board. Was that the purpose? There is no question here as to that. It is admitted that he was appointed on the advisory board and considerable

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[1]Cly did not "take" the oath.
[2]The "oath" does not contain such a provision.

publicity was given to that fact and people came to him. And why did they go to him? Because he was a member of the advisory board. That was the only reason in the world for them to go to him, because he was a member of the advisory board. And what did they find? *Notwithstanding an individual who had agreed to make no charges he nevertheless did.*[3] There is only one man on trial and that is the defendant Cly and you are not to give any consideration to why other people are not on trial.[4]

Counsel for defendant has referred to that in his argument—if we let one fish go then why not let both go or words to that effect. The Government on the other hand has argued that it is important to the enforcement of this law.

Let me say to you that the only question here is whether or not this defendant *accepted bribes* as set forth in the indictment. You are not concerned with why Hill was not prosecuted or that other people may have escaped prosecution. You wouldn't bring in a verdict of guilty in this case in any event if you felt the defendant is not guilty. That wouldn't be fair. That would be crucifying this man as an example for something he hadn't done. If you were to find him guilty on general principle, the court wouldn't want that kind of a verdict.

Defense counsel claims that the main issue in this case is the question of intent—the intent with which

[3]There is no such evidence.
[4]The jury had a right to consider why Hill was not on trial as affecting his credibility.

this money was received, yet at the same time considrable stress is placed upon the Housing and Rent Act. As I have indicated before that is not a matter for your consideration whether you like it or not.

I imagine on this jury there are both landlords and tenants and there could be a first-class row among you if that is true.

I point this out because it is so easy for a jury to get off the beam as the expression is, and I can illustrate that best by a case I tried down on Tucson about a year ago.

The jury room was located in such a place that when the jurors raised their voices you could hear what they were discussing, and in hearing them I found they were discussing everything but the case. They were discussing me. They were trying to determine whether I was tougher than the other judge that had been there. It is so easy for a jury to get away from the subject matter and that is the reason I am pointing this out to you now.

I think there are probably four or five counts of this indictment that you should consider. I have tried to impress upon you the fact that the Rent Control Act is not an issue. *And then considerable stress is made that Mr. Koepke authorized them to make this charge.* Later on in my instructions I will cover that more specifically. Neither Mr. Koepke nor anybody else could authorize this defendant to *violate the law.*[5] That only goes to the question of intent. I couldn't authorize

him, the United States Attorney couldn't authorize him and Mr. Koepke couldn't authorize this defendant to *violate the law.*[5]

Both Mr. Hill and Mr. Cly testified that Mr. Koepke told them that and it is a question of fact for you to determine—did he tell them that? Does their conduct indicate that he told them that?[6] They testified he did. Mr. Koepke denied it *and he fired them for it.*[7] And did Mr. Cly get mad about it? No. He wrote him a letter and said:

'Dear Ben:

'I tender my resignation,'

and in effect he said:

'The contracting business is picking up.'

Does that indicate that a man has been accused of wrongdoing and resented it.?

They say they are amateurs. That is another defense for them—they are amateurs. There is always an amateur in a crime. [8] There is always the first offense. That is no excuse. That may be a plea to your leniency and also for your sympathy.

And then they talk about 'good business' in charging for these services and the hard work they did. *I*

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[5]This assumes that it was a violation of law to receive small sums reimbursing for time and expenses. It invaded the province of the jury, and assumed that defendant was guilty.

[6]This destroys the credibility of the witness for whom the government vouched as its own witness and therefore the government was bound by his testimony. If the court could not tell the jury to ignore the part of Hill's testimony that was unfavorable to the government and showed the defendant's innocence.

[7]Petitioner and Hill resigned. This is not being "fired."

don't care how much work they did or how hard the word was they did.[9] The question is did they have a right to accept *a bribe* because it required work. Would I be justified because I don't think I am getting paid enough to accept money from litigents and then say it was simply for my services.[10]

They say they were only supposed to be working while they were on the board, sitting on the board. Would I be justified in accepting money as an attorney and then pass upon the case before me and say that I was accepting the money as services and not as a bribe and be justified in doing it.[11].

How long would I last before a jury if I came here and told you that?

And then they want to tell you how much hard work they did. I don't care how much work they did. If it was a bribe it was a bribe and you can't call it anything else.

The question for you to determine is whether it was a bribe under all the circumstances and you can take into consideration why these people went to him.

With reference to the first two counts I agree with counsel. If I were on the jury I would find the defendant not guilty of those two counts because he didn't

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[8]This is an argument to the jury to convict. It assumes petitioner had committed a crime.

[9]A laborer is worthy of his hire. No statute or regulation forbad receipt of pay for time, labor, gasoline, expenses.

[10]This is an unfair comparison, since a judge is a paid "officer" of the U. S. forbidden from taking outside employment or any outside fees or compensation.

[11]This tells the jury the court disagrees with defense counsel as to all other counts and to convict thereon.

perform any official services. He may have committed some other offense. It may have been obtaining money under false pretenses. It may have been extortion or whatever you want to call it, but it wasn't a bribe because it was automatically decontrolled.

He accepted $677 without doing anything for them and there was nothing he could have done for them because the law provided for the decontrol of that property.[12]

So, if I were a member of the jury, I would find the defendants not guilty on Counts One and Two.[12]

There has been a lot of talk about the keystone in this case—cockeyed and so forth. I don't care whether it is a keystone or not but it seems to me the outstanding count in this indictment is the *Greco Case,* Count No. 5. What do we find? $300 paid to these men *and their advocating the matter before the board.*[13] As their advocate they were accepting money to advocate his cause and you can't spell anything else out of it, and not only once but three times, If I remember correctly, the evidence shows it was three times before the board—their board where they insisted, notwithstanding the fact that the Expediter had rejected them, they still insisted in advising him that the rents were unfair.

And then the other defense in this case is?

> 'Well, they didn't change my viewpoint anyhow. They were entitled to it.'

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[12]If this were true it would constitute the crime of theft, but not bribery, such a crime is inconsistent with bribery as it invokes a different intent. *Peo. v. Werner*, 29 Cal. App. 2d 126.

[13]Comparison with a judge's duties were unfair since a judge is covered by specific statute forbidding this.

As I will instruct you under the law *that is no defense.* You cannot pre-judge matters and collect money for it. Do you suppose because I happen to feel that Mr. Cly is guilty or not guilty and accepted money for it and had already determined that fact and come in and decided the case in his favor that that wouldn't be a bribe?[14] That is no excuse, that he was going to decide the case that way anyhow.

The important thing in this case is, (and that is one reason I am discussing the facts in this case) there might be a tendency on the jury's part to feel that here is a racket and that the jury is going to break it up: 'We are going to punish him for it,' but you want to remember there is only one offense involved here and that is did this defendant accept a bribe for the purpose of influencing his action as a member of the Board. You might resent what Mr. Cly did in this case but unless you believe he accepted a bribe it is your duty to find him not guilty.

Now, the comments I am making in this case are not to be taken by you too seriously. They are not binding upon you. You can absolutely ignore them. The fact is you can find any verdict contrary to anything I have expressed and that is your privilege because you are the trier of the fact in this case. I am making these comments in an effort to enable you to, what I would say, stay on the beam so when you go to the jury room you will know the issues to be deter-

[14]These comments overlook the other elements the government had to prove. This was not the charge in the indictment.

mined. I think it can correctly be said if the defendant is not guilty under Count Five of the indictment then you should acquit him on all the other counts *because there are all the elements that the Government has claimed in that count, except intent, and that is for you to determine from the facts.*[15] If you don't believe or if there is a reasonable doubt in your mind as to his intent on Count Five then why waste or spoil your afternoon, bring in a verdict of not guilty and acquit him, let him go home and you can go about your business.

As I said before these comments are not binding on you. After you have considered Count Five you will then be in position to consider the other counts of the indictment. The exhibits in the case will be sent to you in the jury room. If there is any count in the indictment the defendant is guilty of it is certainly Count No. 5 providing, of course, you find there was an intent to accept money to influence his conduct as a member of that board. (R. 570-577.)

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[15]These comments overlook the other elements the government had to prove. This was not the charge in the indictment.

APPENDIX

B

Jury Instructions on the Fundamental Issues on the Case.

And the court further instructed the jury as follows:

"This action or indictment has been brought under Section 202 of Title 18 effective September 1st, 1949 and a former section, Section 207. In other words, during the course of the time Mr. Cly was acting as a member of the board *the law was changed* but not substantially changed so far as the law is concerned in this case. I will read to you *only* Section 207 which is entitled: 'Official Accepting Bribe.'

> 'Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either house, or of both houses thereof; shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceedings which may at any time be pending or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be guilty of an offense.'

"Section 204(e) and (1) referred to in the indictment, as the authority under which the local advisory boards were created, reads in part as follows:

'(e)(1) The housing Expediter is authorized and directed to create in each defense rental area, or such portion thereof as he may designate, a local advisory board, each such board to consist of not less than five members who are citizens of the area and who, insofar as practicable, as a group are representative of the affected interests in the area, to be appointed by the Housing Expediter, from recommendations made by the respective governors: Provided, that in any case where the governor has made no recommendations for original appointments to local board or appointments to fill vacancies, within 30 days after request therefor (subsequent to the date of enactment of the Housing and Rent Act of 1948) from the Housing Expediter; the Housing Expediter shall without such recommendation appoint the original members of such boards or such members as may be required to fill vacancies.

'Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

'Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction.

'Adjustments other than individual adjustments in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be necessary

to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title; and

'Operations generally of the local rent office with particular reference to hardship cases;

The Housing Expediter shall furnish the local boards suitable office space and stenographic assistance and shall make available to such boards any records and other information in the possession of the Housing Expediter with respect to the establishment and maintenance of maximum rents and housing accommodations in the respective defense rental areas which may be required by such boards.'

'The Office of Housing Expediter, together with its rent advisory boards, constituted an agency of the United States Government during the years 1947 and including the period January 11, 1949, the effective date of resignation of the defendant Monte Cly from such board.

. . .

You are instructed that to fall within the meaning of the section of the criminal code under which the defendant has been indicted it is *not necessary that he was an officer of the United States,* but it is sufficient *if he was a person acting for or on behalf of the United States in any official capacity under the authority of any department or office of the Government.*[16]

You are further instructed that under the circumstances here presented the defendant in his capacity as

[16]This in effect changed the indictment which charged that he was an officer of the U. S. and told the jury it could convict even though he was not an officer. See *Ex Parte Bain*, 121 U. S. 1.

a member of Rent Advisory Board No. 8 is a person acting for or on behalf of the United States in an official capacity, within the meaning of Section 207, Title 18, U. S. C.

* * *

The fact that Lindsay T. Hill divided with the defendant the money received by him is of no significance unless you also find that such division was made and the money paid to the defendant for the express purpose of influencing *his action in favorably recommending to the Housing Expediter that certain action be* taken by him."[17] (R. 578-581.)

* * *

The court further instructed the jury as follows:

> "The fact that you might believe from the evidence introduced to you by the prosecution or the defense during the course of this trial, that certain other persons or witnesses not named in the indictment were in fact parties to the offense and should have been so named, or prosecuted, is not to be considered by you in favor of or to the prejudice of the defendant who is on trial. Your only concern is to determine the guilt or innocence of defendant Monte Cly who has been named as a defendant in the indictment before you." (R. 584.)[18]

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[17]This was not the charge in the indictment. Petitioner was charged with receiving money to influence his action as a member of the Board in a matter then pending before him in his official capacity.

[18]The jury had a right to consider whether under the facts of this case the government thought Hill, who had taken most of the fees personally—some without any knowledge on the part of appellant in the first instance, and had given half to appellant, acted innocently and with the government's consent, the government being bound by Hill's testimony, the court could not destroy it.

APPENDIX C

EXCEPTIONS TO "COMMENTS"

'The following proceedings were had in the absence of the jury):

"THE COURT: I will listen to any exceptions counsel has to make.

MR. SHIPPEE: While I am satisfied that the court's emphasis on the fact that the jury were the sole judges of the weight and sufficiency of the evidence, nevertheless it is necessary, I think properly so, in order to preserve the record, that I offer an objection to that part of the court's instructions embraced within the comments on the evidence.

THE COURT: They were not part of my instructions.

MR. SHIPPEE: I understand the rule is that it is a part of the court's instructions finally.

THE COURT: In any event, I did make comments. There is no question but what I commented.

MR. SHIPPEE: That is true, and they are embraced within the address of the court to the jury and we have no control over them.

I think that we do have a right to present to the court the situation as we see it where the jury may have received a misapprehension of the evidence. Otherwise, the court, under the guise of commenting on the evidence, could go far afield

and we would have no method whereby we could present an objection or an exception to it. . . . .

THE COURT: May I ask, counsel, is there any statement of fact that I made to the jury that wasn't in the evidence?

MR. SHIPPEE: Yes, your Honor. That is to say, the court said this, in effect—the court said that we had argued to the jury in connection with the defendant Hill, in effect that is, that if they let one go fishing, why not let the other go fishing.

Now I want to point out to the court, and I think the court will remember it, that I made no statement to the jury either directly or indirectly, regarding the effect of the dismissal of this case on Hill upon the remainder of the case. My argument, if the court will recall, was to the proposition that the government, having advanced Hill as a witness, had vouched for him as a truthful witness and that therefore his evidence should be given the same probative value as was to the other witnesses.

I pointed out, likewise, if the court please, that he had not received any offer of immunity and therefore it was not a case of letting one scoundrel go to have him testify against the other. I think I made that statement.

THE COURT: I understand your point. . . .

THE COURT: Exception noted.

MR. SHIPPEE: I think I should enter a formal objection to the court's statement that the jury should first take up Count No. 5.

Now I am not going to belabor that proposition but merely content myself with the statement that

I think that invaded the province of the jury in their consideration of the facts in the case.

THE COURT: Counsel, I haven't told the jury that this man is guilty. I haven't expressed an opinion that he is guilty.

MR. SHIPPEE: That is absolutely correct.

THE COURT: I tried to bring it down to the question of intent and I think when you take all of the camouflage away that has been built around the case, that is the only question involved. What was the intent with which he received this money.

MR. SHIPPEE: Exactly.

THE COURT: That is the sole issue. I would say this, if they find him guilty at all and they don't find him guilty on count 5 I might be susceptible to a motion for a new trial.

THE COURT: Counsel, I am perfectly willing for you to take exception to my comments to the jury." (R. 590-594.)

APPENDIX D

Here are the:

"SPECIFICATIONS OF ERRORS IN COURT OF APPEALS FOR THE NINTH CIRCUIT"

"The appellant specifies the following errors in the record of the trial of the proceedings:

1. (a) The indictment in the counts on which conviction was had fails to state an offense against the laws of the United States. It fails to allege that they "took" the oath of office, and before one authorized to give it. It also fails to state in such counts that they duly and regularly became officers of the United States as members of Rent Advisory Board No. 8 of the Los Angeles Defense Rental Area.

   (b) The Public Law No. 129, 80th Congress, cited as the Housing and Rent Act of 1947, does not forbid the taking of money for services rendered in connection with the Housing Act, and such acceptance of money was not made unlawful by the act.

2. The evidence is insufficient to support the verdicts. The verdicts are contrary to the law and the evidence.

   (a) The evidence fails to show that the defendant Monte Cly duly and regularly actually became a member of the Rent Advisory Board No. 8. The evidence is that he *signed* an Oath of Of-

fice, but the Oath of Office on its face shows that it was not signed before an officer duly authorized to take oaths of office or that he was ever lawfully given the oath of office and inlucted as a lawful member of the Advisory Board.

(b) The evidence is insufficient to show that the defendant Cly was duly appointed pursuant to the provisions of Public Law 129, 80th Congress, and in the manner prescribed by law for such appointment. The evidence shows that he was solicited to become a member of the Board by a Supervisor.

(c) The evidence is insufficient to show that any matters in which monies were taken "were matters then pending before Monte Cly in his official capacity as a member of the Rent Supervisory Board." Count Three alleges taking $50.00 from Mr. and Mrs. Claude W. Chapman, and that the matter was pending before the Board and its members in their official capacity. The evidence fails to show that the matter was pending before the Board in its official capacity. Count Four charged taking $250.00 from Mr. and Mrs. Harry Neiditch, which was not shown by the evidence to be pending before the Board in its official capacity. Count Five charged the taking of $300.00 from Don Greco, which was not shown by the evidence to be pending before him in his official capacity. Count Seven charged the taking of $100.00

from Norman Westcoatt, Executor, which was not shown by the evidence to be a matter then pending before the Board in their official capacity. Count Eight charged the taking of $135.00 from Mrs. Mabel Preston, which was a matter not then shown by the evidence to be pending before the Board in its official capacity. Count Nine alleged the taking of $50.00 from Mrs. Frances Barker, which was a matter not then shown by the evidence to be pending before the Board in its official capacity. Count Eleven charged the taking of $50.00 from Mr. and Mrs. Frank Cohen, which was a matter not then shown by the evidence to be pending before the Board in its official capacity.

(d) The evidence of the government shows affirmatively any lack of criminal intent. The government is bound by the testimony of its witness Mr. Hill.

(e) The evidence is lacking in proof of any criminal intent.

3. The Court erred in admitting testimony of alleged similar transactions regarding Earl J. Templeton (R. Tr., 90, 110) over objections.

4. The Court erred in the admission and exclusion of evidence.

5. The Court erred in its comments to the jury on the facts of the case. The comment was one-sided and unfair in its scope and virtually told

the jury to convict. It added to the facts, and assumed facts not proved and destroyed the constitutional privilege of the accused to testify in his own behalf before the jury without destruction by judges "comment".

The Court erred in its instructions to the jury. The instructions were confusing on the essential law of the case, as charged in the indictment.

It will be noted that the brief does not have a "So-called Specification of Errors" containing 12 paragraphs as set out in the opinion of the Court of Appeal. The opinion deals mostly with the "So-called Specification"—and practically none with the important questions of criminal law and lack of proof of guilt raised by our appeal. We ask this Court to act under its supervisory power in these matters.

MOTION FOR LEAVE TO PROCEED UPON THE TYPEWRITTEN RECORD:

COMES NOW THE PETITIONER AND PETITIONS FOR LEAVE TO PROCEED UPON THE TYPEWRITTEN RECORD on appeal. The typewritten record has been forwarded to the clerk of the court by the Court of Appeals where we proceeded upon the typewritten record. The record is quite long and it would be quite costly to print the record. The petitioner is a local realtor with a neighborhood business, who has been under financial distress since this case and therefore requests leave to proceed upon the typewritten record.

Respectfully,

MORRIS LAVINE,
620 Bartlett Building
215 W. 7th St.,
Los Angeles 14, Calif.
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 740, October Term, 1952.

MONTE CLY,

Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(x),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 1, 1953.

S/ Wm. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 28th day of March, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 740

MONTE G. CLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Tr. 47–53) [1] is reported at 201 F. 2d 806.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1953 (Tr. 54), and a petition for a rehearing was denied on March 3, 1953 (Tr. 55). On March 28, 1953, the time for

[1] The symbol "Tr." refers to the separately paginated first volume of the typewritten record, containing the proceedings in the Court of Appeals; the symbol "R." refers to the remaining four volumes consisting of the typewritten copy of the trial minutes.

filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to May 1, 1953. The petition was filed on April 23, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment alleges facts sufficient to constitute an offense against the United States.

2. Whether the evidence was sufficient to sustain petitioner's conviction.

3. Whether the trial court erred in admitting on the issue of intent testimony involving a separate transaction of the type involved in the offenses charged.

4. Whether the trial court erred in its comments on the evidence and instructions on the law.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra.*, pp. 21–26.

STATEMENT

On August 10, 1950, a fourteen count indictment (Tr. 2–12), charging petitioner and one Hill with accepting bribes while acting in an official capacity for the United States, was filed in the United States District Court for the Southern District of California. Specifically, the several counts charged

that, between April 26, 1948, and December 20, 1948, in Los Angeles County, California, petitioner and Hill, both of whom had been duly appointed and had "signed the oath of office as" members of the Rent Advisory Board No. 8 of the Los Angeles Defense Rental Area,[2] had accepted, either jointly or severally, from various landlords, checks or cash, in amounts varying from $45 to $500, "with the intent that their action would be influenced thereby in favorably recommending to the Housing Expediter" certain rent increases, such being matters "then pending before them in their official capacities" (Tr. 2–11).[3] Petitioner was tried alone (R. 1–362).[4] He was found guilty on counts 3–5, 7–9 and 11 (R. 596–597; Tr. 31), and was sentenced to concurrent terms of 18 months' imprisonment on each count and fined varying amounts as to each count.

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[2] The Advisory Board had been created pursuant to the provisions of Section 204 (e) 1 of the Housing and Rent Act of 1947 (61 Stat. 197, 50 U. S. C. App. (1946 ed., Supp. I) 1894 (e) (1)), which was later amended by Section 202 (d) of the Housing and Rent Act of 1948 (62 Stat. 93, 95, 50 U. S. C. App. (1946 ed., Supp. II) 1894 (e) (1)).

[3] Counts 1, 5, 6, 11, 13, and 14 (Tr. 2–4, 6–7, 9–10, 10–11) charged violations of the provisions of 18 U. S. C. (1946 ed.) 207, while the remaining counts (Tr. 4–5, 7–9, 10) charged violations of the provisions of 18 U. S. C. (1946 ed., Supp. V) 202.

[4] In February 1951, the indictment was dismissed as to Hill on motion of the Government (R. 242, 244). Hill testified on behalf of the Government during petitioner's trial (R. 182–284, 358–359, 530–560).

aggregating $2,555 (Tr. 37–38). On appeal, the judgment of conviction was affirmed (Tr. 54).

The evidence to support the conviction may be summarized as follows:

On November 6, 1947, petitioner, a real estate broker and general contractor, signed an "oath of office" as a member of Rent Advisory Board No. 8, one of twelve local boards within the Los Angeles Defense Rental Area (R. 239–241, 445, 312, 344; Gov. Ex. 14, R. 302). Such office carried no remuneration, and a statement to that effect was prefixed to the oath of office (R. 215, 303, 445–446).[5] A handbook of instructions to board members stated that members were expected to attend the board's meetings for about an hour, once or twice a month (R. 375, 443–444). Like petitioner, Hill was also a member of Board No. 8 (R. 183).

The main purpose of the various local advisory boards was to advise the Area Rent Director or Housing Expediter concerning rental conditions peculiar to their particular localities (R. 306, 307). They were also empowered to review, on appeal to them, the Director's orders granting

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[5]A provision allowed payment to board members only for mileage and per diem, whenever they were away from their official stations overnight (R. 304–306). The boards were provided with office facilities in the Area Rent Director's office, stationery, and a secretary-stenographer, who was employed by the Director, but who was always available to board members (R. 214, 216, 304, 311–312, 462, 463–464).

or denying individual petitions for increases in, or decontrol of, rentals of property within their jurisdiction (R. 306–307, 308, 313), and to make recommendations to the Director, who was not bound to and did not follow them if, on the basis of reports from his inspectors, he considered the recommendations unreasonable (R. 309, 271, 313–314, 331). The Area Rent Office did, however, generally adopt the board's recommendation, if it was "anywhere near reasonable" (R. 308–309, 192, 211–212, 271).

As a result of newspaper publicity attending his appointment as a board member, petitioner was besieged at home and in his realty office by landlords and tenants seeking advice with respect to their rental problems (R. 250–251, 376–377, 442). Although it was never intended that as part of their duties the board members would prepare or file petitions on behalf of individuals seeking rental relief or do anything more than refer such individuals to the Area Rent Director's office, petitioner, working together with Hill, did prepare and file such petitions (R. 307–309, 251, 255–256, 376–378).

Admittedly, around June 1948, in order "to do something to keep living," petitioner and Hill agreed to accept fees for preparing and filing petitions for landlords of large apartment units for whom they "felt" they "could do some good" (R. 470, 478, 283, 377, 200, 205, 251, 392). It was

also understood between them that petitioner was to use his realty office in Venice, California, and "connections" in getting "clients," while Hill would do the necessary paper work connected with the preparation and filing of the petitions, and that they would both share the fees equally (R. 200, 520, 202, 277, 392). Accordingly, they admittedly accepted fees in approximately 10% of an estimated 150 to 200 cases handled by them (R. 283, 378, 470).

In each instance where payment was accepted, Hill, after satisfying himself by a personal inspection (which was not a part of his official duties) that the rental unit deserved an increase, prepared the necessary petition for an increase and mailed it to the Area Rent Director's Office (R. 223–224, 256, 391, 410, 411, 269, 208, 496–497, 539–540). Normally, such petitions would be processed in the Director's office whence an order granting or denying the requested relief would issue (R. 209, 270, 307, 308, 313). Unless an applicant for relief appealed from the order, his petition normally would not come before the Advisory Board (R. 306–307, 329, 466.) But there was nothing to prevent the Chairman of the Advisory Board from obtaining a transfer of any petition from its usual channels directly to the Board for its consideration and recommendation, before the Director had acted thereon (R. 309, 329). Although no other board member had ever

requested a transfer to the board of any petition, Hill and petitioner effected such transfer of several "justifiable" petitions (R. 258, 329, 354, 466, 271). During 1948, petitioner and Hill attended all board meetings, and whenever a petition in which they had accepted a fee appeared before the board, they voted in favor of granting the relief requested (R. 184, 192, 330, 214, 465, 467).

Hill, as a witness for the Government (R. 216, 252–254), and petitioner, on his own behalf (R. 383–389), testified that, prior to accepting any fee, they informed Koepke, the Area Rent Director, or Housing Expediter (R. 528), about the inordinate number of people seeking their services in the preparation of petitions, and the latter advised them to charge fees for their "time and trouble" apart from their attendance at Board meetings. Petitioner also testified that about a week before receiving such advice he consulted Koepke concerning the propriety of his going to Washington for the purpose of getting increases in seasonal or summer rents for certain beach-property owners who had pooled some money to pay for his trip, to which Koepke replied, "I don't see anything that can stop you" (R. 379–380). Koepke testified that he never had any conversation with petitioner concerning compensation for services other than the one concerning the pooling of a fund for sending petitioner to Washington (R. 310–311). Koepke also testified that

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he had never authorized petitioner "to charge landlords or tenants for any of his services", and that upon learning about petitioner's acceptance of fees, he requested and received petitioner's resignation, after accusing him of wrongdoing (R. 311, 317–319, 321, 324, 456, 459).

The counts on which petitioner was convicted relate to the following incidents:

Count 5.—Around June 1948, petitioner and Hill inspected the Santa Monica property of Don Greco, at the latter's request, and advised him that he was entitled to a substantial rental increase which "they would help" him obtain, but that it would cost him $300, as "expense money" (R. 169–171, 175, 188–189, 198, 419, 420, 421). Greco, who "thought" that "Hill had something to do with" the Rent Advisory Board and "presumed" that petitioner was a member thereof, testified that he paid either petitioner or Hill, in Santa Monica, $300 in cash for the preparation of the necessary papers and not to buy any "favor," although he knew that the papers would come before the board (R. 171–172, 176–178, 189, 421, 498, 201). On June 29, 1948, Hill, knowing that the matter would come before his board, prepared and filed an application for a rental increase on the Greco property, after checking "comparable rents" in the Rent Director's Office (R. 199, 189, 191–192, 198, 200). Later, a recommendation for a substantial rental increase was initiated by the

board itself. (Gov't. Ex. 23; R. 569, 546.) Subsequently, Hill accompanied inspectors from the Rent Director's Office in making an inspection of Greco's property (R. 192, 260). Petitioner and Hill made vigorous protests against the inspector's report, which recommended a $5 per unit increase on Greco's property. They were instrumental in placing the Greco matter on the board's agenda on three subsequent occasions, on each of which the board recommended a reinspection of the property and a larger rent increase. (R. 190, 192, 193, 260, 421, 468, 556; Gov't. Exs. 13–15, R. 300, 302, 442–425.) [6] Following several reinspections of the property by his office, the Rent Director declined to accept the board's recommendations, and finally authorized for Greco only a $5 per unit rental increase (R. 421–425, 174, 175).

Count 3.—On December 6, 1948, Claude Chapman gave petitioner, in the latter's office, a check for $50 in payment for an application to the Rent Director for relief from certain rental ceilings previously placed by the O. P. A. on his apartment units in Venice (R. 14–19, 24–26, 33, 36,

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[6] The inspector's report stated that photographs filed with Greco's petition were representative of the furnishings and the interior of only one rental unit, which was "occupied by a tenant who is an interior decorator and the furnishings, color scheme and decorative objects were all the tenant's possession and own execution and not of the type or character supplied with the other units" (R. 341–342, 502–503).

37, 208, 410, 411–412; Gov't. Ex. 1; R. 22, 21). Chapman made the check payable to petitioner even though the latter requested that it be made payable to "Cash" (R. 27). When, prior to making the payment, Chapman informed petitioner that he would prefer the Apartment House Association to make the application for him gratis, rather than pay the fee demanded by petitioner, the latter asked, "Why do that, on account that we are the Advisory Board, and it has to go through us anyway?" (R. 20, 28–29.) Chapman testified that although he knew Hill and petitioner to be members of the Rent Advisory Board, he did not make the payment to "bribe" them, but in order to "get quicker results" (R. 29–31).

Count 4.—On November 15, 1948, Mrs. Harry Neiditch, noting a reference to "Rent Board" in petitioner's office window, and feeling "sure" that she "was dealing with competent people," gave Hill a check for $250, payable to "Cash," as a fee for securing a rental increase on her property in Santa Monica (R. 71, 72, 76, 73–74, 217–220, 416; Gov't. Ex. 5, R. 221). Petitioner shared in half the proceeds of the check (R. 220, 418). Hill prepared and mailed the necessary papers to the Rent Director's Office (R. 218). When the matter came before it, the board acted favorably on the petition (R. 220, 221, 264).

Count 7.—On November 20, 1948, Westcoatt, who was dissatisfied with a previous rental increase on an estate of which he was an executor in Venice, paid petitioner in his office a fee of $100 in cash, not for the purpose of buying "influence," but to avoid "red tape" involved in seeking a still further increase in rentals (R. 129, 133, 134–135, 138, 143, 145–148; Govt. Exs. 6–7, R. 137). Hill prepared the necessary application and transmitted it to the Rent Director's Office (R. 224, 549). When the matter came before it, the board recommended a rental increase, which was later granted by the Director (R. 224–225, 134, 136).

Counts 8 and 9.—On September 4, 1948, Mabel Preston and Frances Barker, who owned, jointly and severally, certain property in Santa Monica, and who knew petitioner to be a rent control official, paid him in his office, respectively, $90 and $45 in cash in order to obtain rent increases (R. 154–156, 157–158, 159, 162, 166–167). Hill prepared and filed with the Rent Director the necessary papers, and the board itself initiated the action for a rental increase on their property (R. 505, 550; Govt. Ex. 20, R. 569, 544). Subsequently, an increase in their rentals was authorized by the Director (R. 159, 160).

Count 11.—In June 1948, petitioner referred Mr. and Mrs. Frank Cohen to Hill who, after clearing objections as to their overcharges on

rentals, filed for them with the Area Rent Director a petition for a rental increase, for a fee, paid in petitioner's office, of about $35, of which petitioner received one-half (R. 231, 232, 233, 433–434, 435–436, 500, 543, 550–551; Gov't. Ex. 19, R. 569, 543. When, through the board's own action, the matter came before it, the board recommended an increase, but the Rent Director refused to follow the recommendation and ordered a decrease in the Cohens' rentals (R. 434, 435, 500; Gov't. Ex. 14, R. 302, 339–340).

With respect to petitioner's intent, Earl Templeman testified for the Government (without objection by petitioner's counsel,[7] who cross-examined him) as follows:

In the early part of December 1948, Templeman, who knew petitioner and Hill to be Advisory Board members, called at the latter's residence in order to discuss an application for a rental increase which had been returned to him by the O. P. A. without any action taken thereon (R. 90–91, 94–95, 97, 99, 110). Petitioner was also present (R. 91–92).[8] Instead of looking at his papers, either Hill or petitioner stated, "Well, we have been all around a little. We don't par-

[7] Petitioner's motion, at the end of Government's case, to strike Templeman's testimony was denied (R. 363–365).

[8] On examination by the defense, Hill testified that Templeman had visited him in connection with a rental problem, but he denied that he had suggested the payment of any money (R. 272–277). He also testified that he didn't "think" petitioner was present on that occasion (R. 275).

ticularly care about what is in those papers. You know how business is done. The boys down at the O. P. A. office have to live, too" (R. 92, 103). Finally, they suggested that it would cost Templeman $100, part of which would go to some individual in the Rent Control Office (R. 92–93). Templeman never accepted the proposition (R. 94, 108).

ARGUMENT

1. Petitioner, among the nineteen questions on which he seeks review, contends in effect (Pet. 33–34, 49, 53–54, 56) that the indictment alleging that he accepted bribes, with intent to influence his official action as a duly appointed and sworn member of a Rent Advisory Board created under the Housing and Rent Act of 1947, is insufficient to charge an offense under 18 U. S. C. (1946 ed.) 207,[9] because (1) the Board was not an "office"

[9] Although, of the seven counts on which petitioner was convicted, only counts 5 and 11 were based on 18 U. S. C. (1946 ed.) 207, while the remaining counts, which alleged offenses occurring after September 1, 1948, were predicated upon 18 U. S. C. (1946 ed., Supp. V) 202, petitioner seems to base his challenge to all the counts upon the construction of the provisions of the former section, because the judge stated in his charge that, since the two sections were the same except for "minor changes" in phraseology, he deemed it unnecessary to read the latter statute as well as the former. However, the assumption that for this reason all counts are laid under Section 202 is patently absurd since it was sufficient for the judge merely to present the necessary elements of the offense to the jury.

On the same reasoning, petitioner attacks the counts which charged payment by check (Pet. 49–50), relying upon

of the United States, and therefore he could not have been an "officer" of the United States, within the purview of the statute, and (2) the indictment does not state that his oath of office was duly taken "before a person authorized to give such oath," as provided by 5 U. S. C. 16 and 18 with relation to "officers" of the United States. But the indictment clearly alleged facts which show that petitioner was not an "officer," but a "person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof" within the terms of former 18 U. S. C. 207, as well as a person acting "by virtue of the authority of" an agency of the United States within the terms of present 18 U. S. C. 202. It has long been established that persons acting under "the authority of any department or office" as used in the earlier statute included persons acting under the authority of any governmental body of the United States. See *Cohen* v. *United States,* 144 F. 2d 984 (C. A. 9), certiorari denied, 323 U. S. 797; *United States* v. *Birdsall,* 233 U. S. 223;

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statement in an old case, *United States* v. *Green,* 136 Fed. 618, 651 (N. D. N. Y.), affirmed, 199 U. S. 601, that a check is not an obligation for the payment of money within the purview of the bribery statute antedating former Sec. 207. It is unnecessary to consider now the present validity of the *Green* case since all counts charging petitioner with receiving payment by check, on which he was convicted, are predicated on 18 U. S. C. 202, which explicitly covers payment by "check."

United States v. *Levine,* 129 F. 2d 745 (C. A. 2); *McGrath* v. *United States,* 275 Fed. 294 (C. A. 2). See also Reviser's Note, 18 U. S. C. (1946 ed., Supp. V) 202. The statement in the indictment that petitioner was "duly appointed pursuant * * * to the Housing and Rent Act of 1947" sufficiently alleges his official status as an element of the crime charged.

2. Petitioner also contends (Pet. 34, 36, 51–52, 57) that even though he admittedly accepted the payments charged in the counts on which he was convicted, the evidence is insufficient to sustain his conviction, because (a) it failed to prove, as charged in the indictment, that the matters with respect to which he accepted payment were then pending before him in his official capacity, and (b) it failed to prove corrupt intent on the part of the persons making the payments.

(a) There was clearly sufficient evidence from which the jury could reasonably have inferred that the matters with respect to which petitioner accepted payment were then "pending" before him in his official capacity. Petitioner himself had testified concerning the high degree of selectivity of the cases in which he accepted payments. According to his *modus operandi,* he did not accept payment until, through Hill's inspection of the rental units, he assured himself that a landlord was entitled to a rental increase and the necessary application for such increase was exe-

cuted and ready for filing with the Rent Director's Office. Since the filing of such applications and their routing in the Rent Director's Office were subject to petitioner's control, the permissible inference is that the applications were in effect pending before petitioner in his official capacity at the moment when, by accepting payment, he obligated himself to do everything in his power to obtain favorable action on what he had already prejudged as a deserving or "justifiable" application. Cf. *United States* v. *Holmes,* 168 F. 2d 888 (C. A. 3); *United States* v. *Levine,* 129 F. 2d 745 (C. A. 2); *Beach* v. *United States,* 19 F. 2d 739 (C. A. 8), certiorari denied, 276 U. S. 623.

Moreover, assuming that the evidence merely proved that petitioner had accepted bribes concerning matters which, officially, were to come before him at some future date, whereas the indictment alleges that such matters were pending at the time of the acceptance of the bribes, the variance is not fatal. See *Berger* v. *United States,* 295 U. S. 78, 82; *United States* v. *Remington,* 64 F. 2d 386 (C. A. 2); *Panella* v. *United States,* 140 F. 2d 71 (C. A. 4); *Mays* v. *United States,* 289 Fed. 486 (C. A. 4), certiorari denied, 263 U. S. 706. The reasons for the rule that allegations and proof must correspond are to prevent the accused from being taken by surprise in the presentation of his defense, and to protect him

against another prosecution for the same offense. *Berger* v. *United States, supra; Malatkofski* v. *United States,* 179 F. 2d 905 (C. A. 1). Here petitioner was fully informed that the charges against him consisted of his acceptance of payments with respect to rent-increase applications of certain named landlords concerning certain described property, with all of which petitioner was fully familiar. He could not have been misled or prejudiced at the trial. The *gravemen* of the offenses of which he was convicted was not the filing of the applications for rental increases, but the acceptance of payments to influence his official conduct. *Whitney* v. *United States,* 99 F. 2d 327 (C. A. 10); *United States* v. *Canella,* 63 F. Supp. 377 (S. D. Cal.), affirmed, 157 F. 2d 470 (C. A. 9). See *Malatkofski* v. *United States supra.* And his present conviction would clearly protect him against another prosecution for the acceptances of bribes which were the basis for the present prosecution.

(b) Intent of one making payment to corrupt the official receiving such payment is not an element of the offense of bribery. There is nothing in the language of the statute to suggest that the offense of bribery is negatived unless the one making the payment to a corrupt official simultaneously commits the offense of offering a bribe under 18 U. S. C. 201, any more than there is in the latter statute language which would

neutralize the offense of offering a bribe unless the offeree criminally intends to receive it as such. See *Malatkofski* v. *United States,* 179 F. 2d 905 (C. A. 1). If, as petitioner contends, reciprocity of criminal intent between the payor and recipient were a prerequisite to the offense of bribery, then a payee of a bribe could never be convicted of an offense where the "briber" or the person to be bribed merely acts as a "decoy" under police instructions.

3. Petitioner's contention (Pet. 34–35) that he was prejudiced by the admission of Templeman's testimony, because it involved a separate transaction unrelated to any of the offenses charged, is without merit.

Templeman's testimony related to a transaction similar in nature to the acts charged in the indictment, and it was properly admitted for the limited purpose of showing petitioner's intent—the crucial issue in the case. It is well established that testimony relating to transactions other than those on which the prosecution is based are admissible to establish the element of intent of the crimes charged. *Nye & Nissen* v. *United States,* 336 U. S. 613, 618; *Canella* v. *United States,* 157 F. 2d 470 (C. A. 9); *United States* v. *Baneth,* 155 F. 2d 978 (C. A. 2); *Henderson* v. *United States,* 143 F. 2d 681, 683 (C. A. 9); *Fall* v. *United States,* 49 F. 2d 506 (C. A. D. C.), certiorari denied, 283 U. S. 867.

4. In submitting the case to the jury, the judge charged that the significant question was whether petitioner had accepted a bribe for the purpose of influencing his action as a member of the Board (R. 572, 576). He pointed out that the jury's reaction to rent-control (R. 572) or its possible dislike of the practice of accepting money were not relevant, stating, "You might resent what Mr. Cly did in this case but unless you believe he accepted a bribe it is your duty to find him not guilty" (R. 576). Commenting on the evidence, he said that if he were on the jury, he would find the defendant not guilty on counts 1 and 2 (R. 575), and that he thought the outstanding count in the indictment was count 5 (see evidence with respect thereto summarized in the statement, *supra,* pp. 8–9), since if there was a reasonable doubt as to intent on that count, petitioner should be acquitted on the other counts as well (R. 575, 577). But at the beginning of the charge (R. 571) and with respect to comments on count 5 (R. 577), the judge told the jury that such comments on the evidence were not binding and could be absolutely ignored.

It is clear that the judge did not exceed the limits of permissible comment in the federal courts. *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S. 466, 469. The court did not distort or add to the evidence, draw any unwarranted inferences, or mis-

lead the jury in any way. The judge was clearly correct in charging that the Area Director could not authorize petitioner to violate the law, but that the issue as to such alleged authorization went only to intent (R. 573); and that hard work would not excuse acceptance of a bribe (R. 574–575).

CONCLUSION

The judgment below is correct and the petition for a writ of certiorari presents no questions warranting review by this Court. It is therefore respectfully submitted that the petition should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.

MAY 1953.

APPENDIX

18 U. S. C. (1946 ed.) 207 (35 Stat. 1109) provided:

> Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.

18 U. S. C. (1946 ed. Supp. V) 202, provides:

> Whoever, being an officer or employee of, or person acting for or on behalf of the

United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.

This section shall not apply to violations of section 213 of this title.

50 U. S. C. App. (1946 ed., Supp. I) 1894 (e) (1) (61 Stat. 193, 198), effective July 1, 1947, provided, in part:

(e) (1) The Housing Expediter is authorized and directed to create in each defense-rental area, or such portion thereof as he may designate, a local advisory board, each such board to consist of not less than five members who are representative citizens of the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors. Each such board shall have sufficient members to enable it promptly to consider individual

adjustment cases coming before it on which the board shall make recommendations to the officials administering this title [sections 1891–1902 of this Appendix] within its area. The local boards may make such recommendations to the Housing Expediter as they deem advisable with respect to the following matters:

(A) Decontrol of the defense-rental area or any portion thereof;

(B) The adequacy of the general rent level in the area; and

(C) Operations generally of the local rent office, with particular reference to hardship cases.

(2) The Housing Expediter shall furnish the local boards suitable office space and stenographic assistance and shall make available to such boards any records and other information in the possession of the Housing Expediter with respect to the establishment and maintenance of maximum rents and housing accommodations in the respective defense-rental areas which may be requested by such boards.

(3) Within thirty days after receipt of any recommendation of a local board such recommendation shall be approved or disapproved or the local board shall be notified in writing of the reasons why final action cannot be taken in thirty days. Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendation into effect.

50 U. S. C. App. (1946 ed., Supp. II) 1894 (e) (1) (61 Stat. 197, as amended, 62 Stat. 93, 94), effective April 1, 1948, provided in part:

> (e) (1) The Housing Expediter is authorized and directed to create in each defense-rental area, or such portion thereof as he may designate, a local advisory board, each such board to consist of not less than five members who are citizens of the area and who, insofar as practicable, as a group are representative of the affected interests in the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors: *Provided,* That in any case where the Governor has made no recommendations for original appointments to local boards or appointments to fill vacancies, within thirty days after request therefor (subsequent to the date of enactment of the Housing and Rent Act of 1948 [March 30, 1948]) from the Housing Expediter, the Housing Expediter shall without such recommendations appoint the original members of such boards or such members as may be required to fill vacancies. Nothing in the foregoing provisions shall require the reappointment of present members of local advisory boards, but any change in the membership of any local advisory board necessitated by this provision shall be effectuated as promptly as may be practicable. Each such board shall have sufficient members to enable it promptly to consider individual adjustment cases coming before it on which the board shall make recommendations to the officials administering this title [sections 1891–1902 of this title] within its area; and before recom-

mending any such adjustment the board shall give notice to the parties and shall hold a hearing at the request of either party. Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

(A) Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction, or with respect to any class of housing accommodations within such area or any portion thereof, if in the judgment of the local board the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exists, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met; and

(B) Adjustments, other than individual adjustments, in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title; and

(C) Operations generally of the local rent office with particular reference to hardship cases.

(2) The Housing Expediter shall furnish the local boards suitable office space and stenographic assistance and shall make available to such boards any records and other information in the possession of the Housing Expediter with respect to the establishment and maintenance of maximum

rents and housing accommodations in the respective defense-rental areas which may be requested by such boards.

(3) Upon receipt of any recommendation from a local board, the Housing Expediter shall promptly notify the local board, in writing, of the date of his receipt of such recommendation. Except as provided hereinafter in this subsection, within thirty days after receipt of any recommendation of a local board such recommendation shall be approved or disapproved or the local board shall be notified in writing of the reasons why final action cannot be taken in thirty days. Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendation into effect.

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